83-1138

No. 83-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GARY J. PEED
and
JAMES C. CODDINGTON,

Petitioners,

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I. Are mid-trial chambers conferences between a juror and a trial judge, regarding the juror's apprehension for his safety caused by third party contact with the jury critical stages of the trial, and the intentional exclusion of the Petitioners and Petitioners' counsel from such proceeding a violation of the Petitioners' right to be present under Fed. R. Crim. P. 43(a) and their Sixth Amendment right to counsel?

II. Is the burden on the Government to prove violations of Petitioners' right to be present and right to counsel during mid-trial *ex parte* juror-judge substantive communications harmless beyond a reasonable doubt pursuant to *Remmer* v. *United States*, *Smith* v. *Phillips* and *Rushen* v. *Spain*?

III. Can a due process post-trial hearing authorized in *Remmer* v. *United States* and *Smith* v. *Phillips* be conducted without adequate notice, without an impartial fact finder and without the right to summon material witnesses and evidence?

PARTIES BELOW

Petitioners, Gary J. Peed and James C. Coddington,[1] pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, affirming the judgment of the United States District Court for the Eastern District of North Carolina, Raleigh Division.

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[1] Petitioners Gary J. Peed and James C. Coddington's cases were consolidated for trial in the United States District Court for the Eastern District of North Carolina, Raleigh Division, and the United States Court of Appeals for the Fourth Circuit with Ronald Doyle Hines, Teresa Eleazar, James Maurice Jackson and Jeffery Craig Bumgardner.

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The Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on September 9, 1983.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of North Carolina, Raleigh Division. A copy of the opinion is attached to this petition (App. 5a-8a). The opinion of the United States Court of Appeals for the Fourth Circuit reported at 717 F.2d 1481 (4th Cir. 1983) the relevant portion of which is attached to this petition (App. 1a-3a). The order of the United States Court of Appeals for the Fourth Circuit denying Petitioners' Motion for Rehearing is attached to this petition (Ap. 4a).

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on September 9, 1983. Rehearing was denied on November 14, 1983. This petition for writ of certiorari was filed within 60 days of the latter date. 28 U.S.C. § 2102(c); Supreme Court Rule 20.1, 20.2, 20.4. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI

STATEMENT OF THE CASE

The Petitioners herein were indicted, tried and convicted of conspiracy to possess with intent to distribute cocaine and use of a communication facility (telephone) in furtherance of that conspiracy in the United States District Court for the Eastern District of North Carolina, Raleigh Division. The Petitioners' appeal from the former conviction was denied by the United States Court of Appeals for the Fourth Circuit.

A. Facts Relating To Extraneous Jury Contacts

There were three extraneous contacts with jurors during the course of Petitioners' and co-defendants' trial.

During their case in chief, as the jury was exiting the courthouse after the sixth day of Petitioners and four co-defendants' trial, at least five jurors (9/30 TR 102 Ap. 41a, 122, Ap. 44a) saw an unidentified individual seated in a parked automobile across from the courthouse aiming a camera equipped with a 12''-15'' telephoto lens at them (9/30 TR 116 Ap. 43a).

Juror Bryant Deaton later testified that because of the nature of the trial, he and the other jurors were "scared," feared for their personal safety and believed the defendants were having pictures taken of the jury (9/30 TR 95, App. 37a-38a, 99, App. 38a-39a; 100, App. 39a-40a; 101, App. 40a).

As a result of his concern Juror Deaton copied the license plate number of the automobile and returned to the courthouse (9/30 TR 85, Ap. 30a). Juror Deaton first told the trial judge's law clerk of the photographing incident. The judge's law clerk immediately advised the trial judge that Juror Deaton was in the outer office. Thereupon, the trial judge had Juror Deaton brought into his chambers.

Juror Deaton related the photographing incident to the trial judge and gave the judge the piece of paper on which he had recorded the license plate number and description of the automobile (9/30 TR 22, Ap. 20a). (This document was never revealed by the Court, viewed by counsel nor admitted into evidence.) The trial judge indicated to Juror Deaton that he was concerned about the incident, that he would look into it immediately and get back to him (9/30 TR 85, App. 30a-31a; 86, Ap. 31a).

The trial judge requested the local F.B.I. office to send an agent to his chambers. Shortly thereafter two F.B.I. agents reported to the trial judge's chambers. The trial judge related Juror Deaton's account of the incident, and gave the agents the information Deaton had written. The trial judge requested the F.B.I. agents to investigate the incident immediately. The F.B.I. agents informed the trial judge that they would find out who was taking the pictures by morning.

The next morning one of the F.B.I. agents who had met with the trial judge the previous afternoon, and F.B.I. Agent James J. Roche, Jr. presented themselves at the judge's chambers.

The F.B.I. agents advised the judge that Agent Roche was the individual who was covertly taking the pictures. That same morning Juror Deaton informed the other members of the jury that he (Deaton) had met with the trial judge the previous afternoon, had informed the judge of the photographing incident and had given the judge the license plate number and description of the automobile (9/30 TR 99, App. 38a-39a). Juror Deaton further told the jury members that the judge was going to "look into the matter and get back to him." At about that

time the trial judge's law clerk entered the jury room and told Deaton that the judge wanted to see him. Juror Deaton then left the jury room accompanied by the judge's clerk and reported to the trial judge's chambers. The trial judge advised Juror Deaton that he (the judge) had looked into it (the photographing incident) and wanted to assure us (the jury) that our safety was not (threatened). However, the trial judge said he would discuss this with me (Juror Deaton) after the trial; and that he would prefer not to now (9/30 TR 86, Ap. 31a).

Juror Deaton then left the trial judge's chambers and returned to the jury room. He conveyed the trial judge's assurances to the rest of the jury (9/30 TR 87, 88, App. 31a-33a).

The trial continued that day and concluded early the following evening with the jury finding the Petitioners and codefendants guilty. (Codefendant Eleazer was found not guilty of using a communication facility in furtherance of the conspiracy).

The trial judge thereafter polled the jury and then thanked them for their services as jurors. He informed them that his law clerk would be giving them a questionnaire which he hoped they would complete and return to him. Then he informed them regarding the procedure for picking up their wraps from the jury room and returning their jury buttons.

At that moment Juror Deaton stood up in the jury box. The U.S. Marshal approached the standing Juror Deaton. The marshal asked permission of the trial judge to approach the bench and an unrecorded bench conference between the marshal and the judge took place. The trial judge then made the following statement.

> Members of the jury, an inquiry was made during the trial to me by one of your number concerned about some of you leaving the courthouse one day and someone snapping pictures out at the curbs and one that was in an automobile. As I told Mr. Deaton the following morning, I investigated that matter and determined that there was nothing to be of any concern to any of you about what happened. I found out the

> source of it, what it was and I assure you that it's nothing to jeopardize any of your health, welfare or security.
>
> If any of you desire to learn more about that, you may communiate with me in private later and I will be happy to discuss it with you further. All right, you may now leave. (TR VOL 9 of 9, App. 12a-13a; 126, Ap. 13a).

This statement was the first information or notice to Petitioners, Petitioners' co-defendants and their counsel regarding the jury's concern for their health, welfare and security as the result of third party contact with the jury and the juror/judge *ex parte* mid-trial communications.

The trial judge stated that he did not advise Petitioners, co-defendants and their counsel of the third party contact with the jury, or the mid-trial communications with the juror because he (the trial judge) didn't feel it would have been proper to do so (TR VOL 9 of 9:138, Ap. 15a). The trial judge further stated he had made a determination that the photographing incident would not affect or jeopardize the right of any of the defendants to a fair trial (TR VOL 9 of 9:140, Ap. 16a). The trial judge declined to furnish any additional information to Petitioners, their co-defendants or counsel at that time. The judge then recessed without answering counsels' oral motion for a more complete disclosure of the incident prior to post-trial motions (TR VOL 9 of 9:140, 141, Ap. 16a).

B. Facts Relating To The Post-Trial Hearing

Petitioners and co-defendants were subsequently notified of a date for argument of post-trial motions without benefit of a complete disclosure from the court. Petitioners and co-defendants nonetheless filed motions for a new trial based upon the third party (picture taking) contact with the jury and the trial judge's *ex parte* communications with Juror Deaton.

On the date set by the trial judge for argument of post-trial motions, Petitioners, co-defendants and counsel, without

notice, were then advised by the trial judge (9/30 TR 20, Ap. 19a) that he (trial judge) intended to conduct a hearing (9/30 TR 6, App. 17a-18a) an evidentiary hearing (9/30 TR 17, Ap. 18a) for the purpose of exploring whether the photographing of the jury in any way prejudiced Petitioners' and co-defendants' trial. The trial judge stated he set this "*Remmer Hearing*" and will follow the procedure of bringing such witnesses to the stand whom I (the judge) will question and then I will allow counsel to question them also (9/30 TR 24, Ap. 21a).

Petitioners and co-defendants moved the trial judge to recuse himself (9/30 TR 24, 25, App. 21a-22a). The trial judge denied the motion. The trial judge stated critical evidentiary facts on the record without first being sworn and without being subject to cross examination (9/30 TR 21, 22, 23, 24, App. 19a-22a). Counsel moved the court to have the thirteen other jurors and alternates present and subject to questioning on the issues of juror impartiality (9/30 TR 27, 28, 169, Ap. 23a-24a, 49a-50a). Counsel objected to the procedure (9/30 TR 6, Ap. 18a) by which the trial judge intended to conduct the post trial hearing . . . (9/30 TR 27, 28, App. 23a-24a).

Thereafter the trial court called F.B.I. Agents Albert P. Koehler and James J. Roche, Jr., and Juror Bryant Lee Deaton as witnesses. The Court permitted Petitioners to call United States Customs Service Agent Susan Rowley who was physically present in Court at the time. It is significant that the Assistant U.S. Attorney asked but one question during the entire post-trial hearing (9/30 TR 59, Ap. 29a) and moved the court to conclude the post-trial hearing without questioning the remaining thirteen jurors and alternates (9/30 TR 168, Ap. 53a).

The trial judge conducted a direct examination of F.B.I. Agent Albert P. Koehler in which he (the trial judge) repeatedly asked the witness leading questions and questions which were highly suggestive of answers (9/30 TR 28, 29, 31, 32, App. 24a-27a). The direct examination by the trial judge of F.B.I. Agent Roche was also characterized by leading questions.

Agent Roche admitted on direct examination he focused his camera on members of the jury (9/30 TR 57, 58, App. 27a-28a).

Juror Bryant Deaton was next called as a witness by the trial judge who continued to ask leading questions (9/30 TR 84-91, App. 29a-35a).

The juror stated the photographing incident would have been a "problem" had he (Juror Deaton) not had the judge's personal assurances (instruction) that he (the judge) looked into it. From that assurance Juror Deaton perceived the trial judge knew the source of the photographing (9/30 TR 89, 90, App. 33a-34a).

The trial judge then asked Juror Deaton whether he had "any feeling or any reason to believe that it (the photographing) had any impact at all on the jury totally—the deliberations of the jury in the trial of this case?" (9/30 TR 90, Ap. 34a). This question was objected to by counsel, but the trial judge overruled the objection (9/30 TR 91, Ap. 34a).

Juror Deaton testified on cross-examination that given the nature of the case he was concerned that there might be some reason that someone would like to know something about the jurors or have pictures of them. He testified he was scared and concerned for his personal welfare (9/30 TR 93, App. 36a-37a)

Juror Deaton further testified he thought some of the other jurors were also concerned (9/30 TR 95, Ap. 38a). He testified that every member of the jury panel was aware of the fact that he (Deaton) and others had been photographed as they were leaving the courthouse, and knew he (Deaton) had taken down the license plate number of the car and reported it to the judge (9/30 TR 99, App. 38a-39a). Notwithstanding the trial judge's personal assurances, Juror Deaton could not testify whether the other jurors were as assured as he was (9/30 TR 100, App. 39a).

Further cross-examination of Juror Deaton indicated that he (Deaton) believed the perpetrator(s) of the photographing in-

cident to be the Petitioners and co-defendants (9/30 TR 100, 101, Ap. 40a).

Juror Deaton testified that his fear abided with him overnight (9/30 TR 101, Ap. 40a). He testified that from September 1, 1982, the date of the incident, until September 30, 1982, the date of the post-trial hearing, he (Juror Deaton) believed the photographing incident had something to do with the case; the trial judge never informed Juror Deaton otherwise (9/30 TR 106, 107, Ap. 42a).

In view of the information elicited from cross-examination of Juror Deaton, counsel again requested the opportunity to examine the thirteen other jurors and alternates, and D.E.A. Agent Johannesen. Counsel also requested that the court initiate a further investigation into the effect of this matter on the deliberation of the jury. The trial judge did not respond to this request (9/30 TR 145, 147, App. 47a-48a).

In his Order of November 8, 1982 (Ap. 8a), the trial judge summarily denied Petitioners and co-defendants' right to call the thirteen additional jurors and alternates for examination by the court and cross-examination by counsel. The trial judge found that Juror Deaton was the only juror directly involved and therefore the only juror who could have been prejudiced or influenced in any way.

REASONS FOR GRANTING THE WRIT

Important questions are presented involving serious aspects of federal criminal justice.

Petitioners ask this Court to recognize that the fundamental rights of a criminal defendant to be present and to be represented by counsel during mid-trial substantive communica-

tions between judge and jury are of a constitutional dimension. (Petitioners concede that non-substantive communications—e.g., responding to questions as to the location of the washroom—are not of a constitutional dimension.) If such rights are recognized, then *Rushen* v. *Spain*, 464 U.S. ____, (Slip op. Dec. 12, 1983) [a decided case not yet published in official advance sheets] established that a violation of such rights must be proven harmless beyond a reasonable doubt. A post-trial determination of harmless error must be clearly distinguished from the type of due process post-trial hearing authorized in *Smith* v. *Phillips*, 455 U.S. 209 (1982).

The Court of Appeals approved the District Court's denial of Petitioners' motion for a new trial without the benefit of a full hearing with full participation of Petitioners into the issues of mid-trial third party contact with the jury and mid-trial *ex parte* juror judge substantive communications.

The decision in this case illustrates the confusion that exists after the recent decisions of *Smith* v. *Phillips*, *Id.* and *Rushen* v. *Spain*, *supra*. *Smith* and *Rushen* involved a number of separate but interrelated constitutional rights: 1. the right to be present at a critical stage of trial; 2. the right to be represented by counsel at critical stages of the trial; 3. the right to an impartial jury; 4. the right to a due process post-trial hearing on jury bias; and 5. a possible due process right to a mid-trial hearing on jury bias. As Justice Stevens noted in his concurring opinion in *Rushen*, confusion abounds in identifying these rights and applying them in a factual context.

This confusion led Petitioners' trial judge to overlook the Petitioners' right to be present and to be represented by counsel during mid-trial substantive communications between judge and jury. This confusion further caused the trial judge to erroneously relieve the government of its burden to prove violations of such rights are harmless beyond a reasonable doubt. The trial judge mistakenly applied the principles of *Smith* in conducting the wrong type of post-trial hearing and erroneously placed the burden upon the Petitioners to prove

actual prejudice. Such confusing application of *Smith* and *Rushen* is likely to recur unless this Court provides clarification.

Rushen applied the harmless error doctrine to assumed violations of a defendant's right to be present and to be represented by counsel at mid-trial communications between judge and jury, but *Rushen* did not decide the underlying issue of whether such "fundamental rights" are of "constitutional dimension." Slip op. at 3, n. 2. The opinion in *Rushen* contains strong language suggesting that trial courts should immediately notify counsel of communications with the jury, but the bench and bar require guidance as to whether this suggestion is a constitutional mandate. As this Court noted in *Rushen*, *Id.* at 4, "There is scarcely a lengthy trial in which one or more jurors does not have occasion to speak to the trial judge about something. . ." A situation which occurs so frequently should be directly and clearly addressed by this Court.

Smith authorized a post-trial hearing where the defendant has the burden to establish a constitutional violation of the right to an impartial jury. *Rushen*, however, authorized a post-trial inquiry into a different constitutional violation—denial of the right to be present and the right to counsel. *Rushen* also recognized a different burden of proof—harmless beyond a reasonable doubt. The trial court in this case mistakenly conducted a *Smith* type hearing thereby placing the burden of proof upon the Petitioners. The Petitioners were entitled to both a *Smith* type hearing and a *Rushen* type hearing where the government has the burden of proof.

This case also presents the opportunity to clarify and define the nature of a *Smith* type hearing by deciding whether a *Smith* hearing is distinct from a *Remmer* hearing where the Petitioners would be entitled to a presumption of prejudice. Prior to *Smith*, the long standing precedent of *Remmer* v. *United States*, 347 U.S. 227 (1954) had provided guidance for post-trial inquiries into jury contamination by third parties. The *Smith* opinion cited *Remmer* but did not mention *Rem-*

mer's presumption of prejudice. It is now unclear what remains of the *Remmer* presumption of prejudice. *Smith's* holding that due process merely requires that a defendant have an "opportunity to prove actual bias" can be read as overturning the *Remmer* presumption. However, *Smith* and *Remmer* can both be read as valid law if each is limited to a distinct situation. *Remmer* involved third party contact with a juror, and the presumption of prejudice may apply only when third party contact exists. *Smith*, however, did not involve any third party contact but only the juror's own possible misconduct which raised the issue of potential bias. When no third party contact exists, the *Remmer* presumption of prejudice may be inapplicable and the burden to prove actual prejudice may shift to the defendant. Because proof of any form of jury bias is often difficult to obtain in a post-trial hearing, allocation of the burden of proof will often determine the substantive issue. This Court should provide needed guidance to the lower courts by explaining whether the *Remmer* presumption of prejudice survives the holding in *Smith*. If the *Remmer* presumption still applies to third party contact cases, then the Petitioners' trial court improperly charged the Petitioners with the burden of proving actual prejudice. The apparent photographing of jurors herein constitutes third party contact and raises the *Remmer* presumption of prejudice as does the third party substantive judicial contacts.

Guidance is also needed as to the nature of the defendant's "opportunity to prove prejudice" in a *Smith* type hearing. Petitioners believe that all previous cases permitted examination of every juror who was aware of the extraneous facts which raised the possibility of juror bias. The present case stands alone in denying the defense an opportunity to examine those jurors aware of potentially prejudicial information.

Rushen also appears to hold that the opportunity to prove prejudice is not restricted by Fed. R. Evid. 606(b). The Circuit Courts have differed as to whether Rule 606(b) precludes post-trial examination of jurors. *Rushen* appeared to define, in footnote 5, the area of proper inquiry in post-trial examination of jurors. If this footnote does in fact dispose of the controversy

surrounding Rule 606(b), there should be no legitimate legal obstacle to the Petitioners' questioning of all jurors. The Petitioners' trial court was thus in error in denying the Petitioners' right to examine all jurors.

This Court should now advise the Circuits of the proper procedure to safeguard the integrity of the jury system and ensure all defendants their constitutional right to a fair and impartial trial.

ARGUMENT

I. Mid-Trial Chambers Conferences Between A Juror And A Trial Judge, Regarding The Juror's Apprehension For His Safety Caused By Third Party Contact With The Jury Are Critical Stages Of The Trial, And The Intentional Exclusion Of The Petitioners And Petitioners' Counsel From Such Proceedings Is A Violation Of The Petitioners' Right To Be Present Under Fed. R. Crim. P. 43(a) And Their Sixth Amendment Right To Counsel.

In *Rushen* v. *Spain*, 464 U.S. ___ (Slip op. Dec. 12, 1983) this Court noted that "the right to personal presence at all critical stages of the trial and the right to counsel are fundamental rights of each criminal defendant" Slip op. at 3, but this Court did not decide if such rights were of a constitutional dimension because the government had conceded federal constitutional error. *Id.* at 3, n. 2. The Petitioners contend that such fundamental rights are of a constitutional dimension.

The right to counsel exists "at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." *Coleman* v. *Alabama*, 399 U.S. 1 (1970). This Court has recognized that "any *ex parte* meeting or communication between the judge and the foreman of a deliberating jury is pregnant with possibilities for error." *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 460 (1978). The defendant and counsel must be present at such meetings to guard against any unintended and misleading impression communicated by the trial judge, and to correct whatever mistaken impression the juror might

otherwise communicate to the other jurors. *Id.* at 460-62. Counsel's intentional exclusion, without notice, from the trial court's chambers conference with Juror Deaton prevented counsel from protecting the fundamental integrity of his client's trial by jury. *United States* v. *Myers*, 626 F.2d 365 (4th Cir. 1980).

The application of the harmless error doctrine in *Rushen* v. *Spain* does not render it any less crucial to determine whether the underlying constitutional rights exist. The harmless error doctrine is a useful device for avoiding needless reversals, and as such, the doctrine affects only the remedy not the existence of the basic rights. By definition the harmless error doctrine means that the error which occurred in the progress of the trial was not prejudicial to the rights of the party assigning it, and for which, therefore, the Court will not reverse the judgment. In order to deter excessive reliance on the harmless error doctrine and to avoid, when possible, the inherent difficulties of determining prejudice at post-trial hearings, it is important for this Court to enunciate the correct constitutional procedure. Petitioners contend that the correct constitutional procedure was established in *United States* v. *Ronder*, 639 F.2d 931 (2d Cir. 1981) where the Second Circuit identified four necessary components for the proper disposition of any communication between judge and jury.

> "THE JURY'S INQUIRY SHOULD BE SUBMITTED IN WRITING."
>
> IT "SHOULD BE MARKED AS A COURT EXHIBIT AND BE READ INTO THE RECORD IN THE PRESENCE OF COUNSEL AND THE DEFENDANT."
>
> "COUNSEL SHOULD BE AFFORDED AN OPPORTUNITY TO SUGGEST APPROPRIATE RESPONSES."
>
> "MESSAGES FROM A JURY SHOULD BE ANSWERED IN OPEN COURT. . . ."

(1) "The jury's inquiry should be submitted in writing. This is the surest way of affording the court and counsel an appro-

priate opportunity to confer about a response." *Id.* at 934. Such a requirement insures that counsel will have proper *notice* of the communication. Secret communications between judge and jury cannot be tolerated in our criminal justice system. Had Juror Deaton not spoken up in open court after the verdict (TR VOL 9 of 9:125, 126, App. 12a-13a) the Petitioners might never have learned that the communications occurred. The integrity of the judicial system and the appearance of justice demand a rule which precludes the possibility that the trial court's communications with a juror might remain secret because of oversight or faulty judgment on the part of the trial judge. *Rogers* v. *United States*, 422 U.S. 35 (1975); *United States* v. *Ferguson*, 486 F.2d 968 (6th Cir. 1973). The communications in this case were not the result of some inadvertent encounter between the judge and the juror in a hallway or elevator. Both communications occurred after the trial judge summoned the juror to his chambers. (9/30 TR 22, Ap. 20a). "The judge should have advised counsel immediately on receiving the [communication]." *United States* v. *Gersh*, 328 F.2d 460, 463 (2d Cir. 1964); *United States* v. *Hines*, 696 F.2d 722, 730 (10th Cir. 1982); *Rushen* v. *Spain*, 464 U.S. ____ (Slip op. Dec. 12, 1983).

(2) When the communication is reduced to writing it "should be marked as a court exhibit and be read into the record in the presence of counsel and the defendant." (*United States* v. *Ronder*, 639 F.2d 931, 934 (2d Cir. 1981)). Even though the trial judge must have some discretion in dealing with jury communications, "his discretion is always subject to review for abuse, and a record is necessary for such review." *United States* v. *Gay*, 522 F.2d 429, 435 (6th Cir. 1975). The trial judge here attempted to reconstruct the communications at the post-trial hearing, but at best he could only attempt to paraphrase the communications. The exact words used can be crucial and there is little point in having counsel and the trial court labor over the precise wording of formal instructions when only the gist of such informal instructions can be reconstructed for appellate review. There is also no way of knowing what unintentional messages the juror or judge communicated

during their meetings—a shrug of the shoulders; a tone of voice; an exchange of knowing glances accompanying an oral communication, etc. (*See generally*, Judges' Nonverbal Behavior in Jury Trials: A Threat to Judicial Impartiality, 61 Va. L. Rev. 1266 (1975)). This Court has recognized that such unintended and misleading impressions are a very real possibility—"all the more so when counsel are not present to challenge the statements." *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 460 (1978). In the absence of a record of the communication between judge and juror, prejudice to the defendant must be presumed. *United States* v. *Myers*, 626 F.2d 365, 366 (4th Cir. 1980); *United States* v. *Taylor*, 562 F.2d 1345, 1365 (2d Cir. 1977); *United States* v. *Treatman*, 524 F.2d 320, 323 (8th Cir. 1975); *United States* v. *Gay*, 522 F.2d 429, 435 (6th Cir. 1975).

(3) "Counsel should be afforded an opportunity to suggest appropriate responses." *United States* v. *Ronder*, 639 F.2d 931, 934 (2d Cir. 1981)). Fed. R. Crim. P. 30 requires the trial judge inform counsel of the disposition of proposed requests to charge prior to summations. It is well established that counsel has the right to submit proposed instructions and raise objections to the instructions the court intends to give. In *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 462 (1978) this Court found it "most troubling" that counsel were denied any chance to correct whatever mistaken impression the juror might have taken from his conversation with the judge. "The issue here is not whether the language of the court's communication with the jury in itself constituted reversible error, but rather whether the input of the defendant and his counsel at the appropriate moment could have substantially affected the content of the message to the jurors. . . ." *Krische* v. *Smith*, 662 F.2d 177, 180 (2d Cir. 1981). Although Juror Deaton was told that he had nothing to fear, the trial judge never explained that the photographing incident was not connected with the defendants (9/30 TR 106, App. 41a-42a). If any jurors continued in the belief that the defendants were responsible for photographing the jury, the jurors might have wished to punish the defendants for this misconduct. "Jurors required by

the presumption of innocence to accept the accused as a peer, an individual like themselves who is innocent until proved guilty, may well see [a person who deserves to be convicted.]" *Estelle* v. *Williams*, 425 U.S. 501, 518-19 (1976) (Brennan, J., dissenting).

Juror Deaton, as well as the other jurors, had been subjected to extraneous influences to which no juror should be subjected, for it is the law's objective to guard jealously the sanctity of the jury's right to operate as freely as possible from outside unauthorized intrusions purposefully made. *Remmer* v. *United States*, 350 U.S. 377, 382 (1956)

The trial court denied counsel the opportunity to inquire into the jurors' impartiality. The photographing incident was so troubling to Juror Deaton that it provoked him to breach an explicit admonition from the judge not to discuss the case with anyone. Reasonable concerns were thus raised about the ability of Juror Deaton and other jurors to continue as impartial jurors. The Petitioners' absence from conversations implicating a juror's ability to judge impartially the case against them presents the same possibility for frustrating the fairness of the proceedings as would their absence from initial voir dire. Unlike the situation in *Rushen* v. *Spain*, 464 U.S. ____ (Slip op. Dec. 12, 1983) (Stevens, J., concurring) potential bias arose after the commencement of the trial and could not have been uncovered during the initial voir dire. While attempts to reconstruct the juror's state of mind at post-trial hearings are deemed adequate after constitutional error occurs, their inherent deficiencies demonstrate that post-trial hearings are less desirable than an immediate inquiry into a serious question of juror impartiality. At the post-trial hearing the juror and trial judge admitted they had been afraid for the juror's safety (9/30 TR 25, 93, App. 22a, 36a-37a) but the memory of that fear some four weeks after the event does not give an accurate picture of the situation. Questions posed at a time when the emotional state prompting the juror's contacts with the trial judge was still fresh might well elicit from the juror(s) different responses from those given at a post-trial hearing.

Courts have taken note of the obvious inadequacies of post-trial inquiries into a juror's state of mind. "Even when the investigation is made immediately upon learning of an intrusion it is extremely difficult to learn the extent of the extraneous influence upon a jury. This difficulty is compounded if questioning is deferred. . . . Considering the problem of fading memories and the natural reluctance of a juror to admit that he had been improperly influenced . . ." it is almost impossible to make such a determination at a post-trial hearing. *Krause* v. *Rhodes*, 570 F.2d 563, 570 (6th Cir. 1977). *Smith* v. *Phillips*, 455 U.S. 209 (1982) is distinguishable from the present case because there was no opportunity for a mid-trial voir dire. In *Smith* v. *Phillips* the trial court convened a post-trial hearing immediately upon being informed that there was an issue of possible juror misconduct. This Court held that a post-trial hearing was an adequate remedy in such a situation. But the situation in Petitioners' case is quite different. The trial judge was aware of possible jury contamination during the trial, and attempted to handle the matter through *ex parte* and unrecorded communications with the jury. In such situations the defendant and counsel have the right to participate in mid-trial communications and cannot be restricted to participation in an after-the-fact post-trial hearing. Petitioners are not asking that *Rushen* be overruled. Once error occurs it may still be harmless. The harmless error doctrine only affects the remedy not the underlying right. A violation of a constitutional right may ultimately be deemed harmless, but it does not retroactively eliminate the right. Petitioners seek a determination of the unresolved issue in *Rushen*, the initial right to participate in mid-trial communications regarding jury bias.

Had counsel been permitted an immediate inquiry into potential jury bias, the probing questions of counsel would have more fully illuminated the jurors' state of mind. This was amply demonstrated at the post-trial hearing when Juror Deaton's characterization of his state of mind in response to

questions from the trial judge is contrasted with his response to counsel's questions:

Judge: As a result of that incident, did you at any time have any apprehensions or fear for your safety?

Juror: No, I didn't. (9/30 TR 88, App. 32a-33a).

* * *

Counsel: Your concern basically was for your own personal welfare; was it not?

Juror: Yes, it was.

Counsel: Would it be safe to say that you were somewhat scared?

Juror: I think that is—I was scared. Well, yes, sir; sounds good. (9/30 TR 93, App. 36a-37a).

* * *

Counsel: And I believe, if you will relate again—didn't you talk with the other jurors immediately after talking with Judge Britt about what had taken place?

Juror: Yes; I did.

Counsel: Can you relate any specific remarks that any particular juror made at that time?

Juror: I will summarize what I think the feeling was. I don't remember particular remarks. I think some of them were, just as I was, concerned. And then when I came back and relayed the message, it was not discussed.

Counsel: But at the time—

Juror: (Interposing) I don't remember any specific remarks.

Counsel: But their concern, then—your testimony is their concern was basically the same as yours? And that is your personal welfare and safety?

Juror: Yes. (9/30 TR 95, App. 37a-38a).

* * *

Counsel: . . . When you first experienced this incident, you have indicated you had concern? And then it was developed it was concern for safety and other concerns? Who did you think would be the perpetrator of anything that would affect your safety? What was going on in your innermost mind as to who was behind all this—you are in a lawsuit and you are a juror—the United States of America or the Defendants sitting over here at these tables?

Juror: The Defendants.

Counsel: It didn't enter your mind at all that the Government would be doing you bodily harm?

Juror: No.

Counsel: And I realize you have been very tasteful in communicating it. But I want to be sure that I understand what was going on in your mind. Is this an accurate summary of what your apprehension was: that someone was taking photographs of the jurors, so that if they voted "guilty" that someone might come do them bodily harm?

Juror: Yes, sir.

Counsel: That was what you were afraid of?

Juror: Yes.

Counsel: And that fear abided with you for a period of time?

Juror: Until the next morning; yes.

Counsel: Well, a period of time is overnight?

Juror: Okay.

Counsel: It abided with you during that period of time, from the afternoon experience until you had your communications with the court?

Juror: Yes. (9/30 TR 100-101, App. 39a-41a).

The trial judge admitted that he carried the central role at the post-trial hearing in defending the actions he had taken (9/30 TR 174, Ap. 50a). The trial judge's efforts to justify his handling of the matter is understandable in view of the only remedy available to him at a post-trial hearing—the granting of a new trial. Had the judge conducted a mid-trial inquiry with full participation of counsel, the trial court may have been able to cure any prejudice with a cautionary instruction, or utilize alternate jurors and proceed with trial. The trial judge's interest in defending his handling of the matter may not be sufficient to render him unfit to preside [*cf: Tumey* v. *Ohio*, 273 U.S. 510 (1927)] but it certainly affects his impartiality and openmindness about the prejudice to the defendant. The acknowledgement of a criminal defendant's constitutional right to be present with counsel during mid-trial inquiries affords the trial court a number of available options, and alleviates the pressure on a trial judge to try to find some way to uphold the jury verdict. The acknowledgement of this constitutional right would also place a lesser burden on the government. There are few prosecutors who would not welcome a mid-trial opportunity to address jury bias, rather than face the burden of proving beyond a reasonable doubt at a post-trial hearing that the defendant was not prejudiced by *ex parte* communications between judge and jurors.

An open and immediate inquiry into juror impartiality would also provide an opportunity for counsel to reassess the evidence to be presented or take other "tactical steps" which might offset or mitigate the juror's potential bias. *Gibson* v. *Clanon*, 633 F.2d 851, 854 (9th Cir. 1980); *Rushen* v. *Spain*, 464 U.S. ____ (Slip op. Dec. 12, 1983) (Marshall, J., dissenting). This opportunity, once lost, cannot be regained by a post-trial hearing. Although Petitioners' trial counsel had no knowledge of the photographing of the jury, they were aware that photographs had been taken of defense counsel and others (9/30 TR 179-180, App. 51a-52a). Trial counsel Kupferberg indicated at the post-trial hearing that this incident played some part in tactical decisions regarding the presentation of

the defense case (9/30 TR 141-144, App. 44a-47a). Had defense counsel been informed that the jury was concerned that Petitioners and co-defendants were a threat to their safety, counsel may have altered their presentation of evidence to establish that the defendants were not of a character to harm jurors. It is, of course, speculation as to how the defense strategy might have been affected, but it is the denial of Petitioners' right to be present and the right to counsel which necessitate this speculation.

(4) "Messages from a jury should be answered in open court. . . ." *United States* v. *Ronder*, 639 F.2d 931 (2d Cir. 1981); *United States* v. *Gay*, 522 F.2d 429, 436 (6th Cir. 1975); *Rogers* v. *United States*, 422 U.S. 35 (1975). "Any occasion which leads to communications with the whole jury through one juror inevitably risks innocent misstatements of the law and misinterpretations despite the undisputed good faith of the participants." *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 461 (1978). Juror Deaton communicated his meetings with the judge to other jurors (9/30 TR 95, 99, App. 37a-38a), but there is no way to determine precisely what Juror Deaton said when he returned to the jury room. Nor is there any way to know how the jurors reacted to this "second-hand instruction" from the trial judge. As this Court noted in *United States* v. *United States Gypsum Co.*, *Id.* at 461, any confusion would have been readily cleared by calling the entire jury into the courtroom for a clarifying instruction. The trial judge may have been concerned with contaminating those jurors who were unaware of the photographing incident, but at a minimum the judge should have discussed the matter, in the presence of counsel, with those jurors who already knew of the incident. The form of *ex parte* communication between the judge and jury utilized in this case violates both Fed. R. Crim. P. 43(a), Fed. R. Crim. P. 30 and the Sixth Amendment. *United States* v. *Flaherty*, 668 F.2d 566, 602 (1st Cir. 1981); *United States* v. *Myers*, 626 F.2d 365, 366 (4th Cir. 1980); *United States* v. *Bufalino*, 576 F.2d 446 (2d Cir. 1978); *United States* v. *Jones*, 542 F.2d 186 (4th Cir. 1976).

II. The Burden Is On The Government To Prove Violations Of Petitioners' Right To Be Present And Right To Counsel During Mid-Trial *Ex Parte* Juror-Judge Substantive Communications Harmless Beyond A Reasonable Doubt Pursuant To *Remmer* v. *United States*, *Smith* v. *Phillips* And *Rushen* v. *Spain*.

The trial judge applied an erroneous standard at the post-trial hearing because he failed to identify the separate constitutional violations which occurred. (Order of Judge Britt dated 11/8/82, Ap. 8a) (See *Rushen* v. *Spain*, 464 U.S. ____ (Slip op. Dec. 12, 1983) (Stevens, J., concurring).) The post-trial hearing inquired into the possible violation of Petitioners' right to an impartial jury caused by the photographing incident, but failed to consider any possible prejudice flowing from the trial judge's *ex parte* communications with the jury. Defense counsel alerted the judge to this separate issue: "part of the problem here, Judge—and I say this respectfully—was the non-disclosure to defense counsel." (9/30 TR 174, App. 50a-51a). But at no point in the hearing nor in the opinions of the District or Appeals courts is any consideration given to the possible prejudicial effect of the denial of Petitioners' right to counsel at the communications between judge and jury. Thus the post-trial hearing did not determine that the trial judge's handling of this matter was harmless error because the issue was never addressed although raised by Petitioners.

The trial court attempted to conduct the type of hearing mandated in *Smith* v. *Phillips*, 455 U.S. 209 (1982), but *Smith* v. *Phillips* did not involve any *ex parte* communications between judge and jury. *Smith* v. *Phillips* places the burden on the defense to prove a violation of the constitional right to an impartial jury. In this case the trial court totally ignored the separate issue of a violation of Petitioners' constitutional right to be present and to be represented by counsel at the communications between judge and jury. "The right to the assistance of counsel and the right to be present at critical stages of the trial . . . were not at issue in *Smith*." *Rushen* v. *Spain*, 464 U.S. ____, (Slip op. at 11, n. 20, Dec. 12, 1983) (Marshall, J., dissent-

ing). By relying exclusively upon *Smith*, the trial court failed to appreciate that "the language used by the Court in *Smith* to define the burden a criminal defendant must sustain in order to prove an abridgement of his constitutional right to an impartial jury thus has no relevance to [the denial of the right to be present and to be represented by counsel]" *Id.* Slip op. at 13, n. 23. In *Rushen* v. *Spain* this Court applied the harmless error doctrine to such assumed constitutional violations and gave great deference to the findings of the lower court. No deference can be given to the lower courts in this case because the lower courts never made a determination regarding the prejudicial or harmless effect of such constitutional errors. "We can let stand no conviction where the defendant was not present at all stages of the proceedings unless the record completely negates any reasonable possibility of prejudice arising from such error." *Jones* v. *United States*, 299 F.2d 661, 662 (10th Cir. 1962).

III. Adequate Notice, An Impartial Fact Finder And The Right To Summon Material Witnesses And Evidence Are Essential To Conduct A Due Process Post-Trial Hearing Authorized In *Remmer* v. *United States* And *Smith* v. *Phillips*.

Petitioners, co-defendants and counsel appeared at the trial court for argument of their respective motions for new trial and sentencing on September 30, 1982. Upon arrival in the trial judge's chambers, the judge announced that he intended to conduct a "*Remmer* type" hearing. (9/30 TR 6, 20, App. 17-18a, 18a-19a) Counsel had not received advance notice of the nature of the hearing nor were they given an opportunity to collect factual information or prepare argument prior to the commencement of the hearing. The record reflects this confusion.

> Trial Counsel Tew: Your Honor, may I inquire as to whether the court intends, in fact, to conduct such a hearing? (9/30 TR 6, App. 17a-18a).
>
> * * *

> Trial Counsel Sheppard: May I ask the Court to set on the record—I don't really know what is happening—and I don't think the record does either. (9/30 TR 20, Ap. 19a) * * * Someone has evaluated what we need . . . . I can't conclude that it was anyone other than the Court that has evaluated what we need for the hearing. (9/30 TR 20-27, App. 18a-24a).

The due process concept of notice requires that counsel be informed of the relevant factual situation and legal issue set forth, be allowed to develop additional facts, and have an opportunity to prepare legal argument for the court's consideration. The trial court's precipitous handling of the hearing forced Petitioners' counsels to react spontaneously to previously undisclosed facts and thus denied Petitioners any opportunity to be heard in a meaningful fashion.

The post-trial hearing was constitutionally inadequate because the trial judge did not function as an impartial fact-finder. The trial judge did not place the burden on the prosecution to rebut the presumption of prejudice, *Remmer* v. *United States*, 347 U.S. 227 (1954), nor did he place the burden on the defense to initially prove prejudice. *Smith* v. *Phillips*, 455 U.S. 209 (1982). Instead the trial judge shouldered the entire load and set out to disprove prejudice by testifying without being placed under oath or subject to cross-examination. The trial judge's precipitous handling of the hearing indicates that he was attempting to make a record justifying his previous decision that the photographing incident did not "in any way, affect or jeopardize the right of any of the defendants to a fair trial. . . ." (TR VOL 9 of 9:140, Ap. 16a). As counsel pointed out to the court, this previous decision was made without a hearing and without participation of counsel (TR VOL 9 of 9:140, Ap. 16a). The trial judge did not function as an independent fact finder, but as an advocate defending a previously determined position.

Petitioners do not contend that every trial judge is disqualified from conducting the post-trial hearing authorized in *Smith* v. *Phillips*. The *Smith* case is distinguishable from the present case because the trial court in *Smith* was inquiring into

possible misconduct by a juror and/or the prosecution. The judge's own conduct was not at issue in *Smith*. In the present case, however, the trial judge assumed the position of defending, then passing judgment upon his own possible contamination of the jury. When the trial judge's own conduct is in question, the judge should disqualify himself as did the judge in *United States* v. *Rakes*, 74 F. Supp. 645, 647 (E.D. Va. 1947). As this Court stated in *Ward* v. *Monroville*, 409 U.S. 57, 60 (1972) the proper test for judicial impartiality is whether the situation is one "which would offer a possible temptation to the average man as a judge . . . which might lead him not to hold the balance nice, clear and true between the State and the accused . . ." A fair reading of the transcript of the post-trial hearing demonstrates that the trial judge became an advocate defending his own actions and did not hold the balance true (9/30 TR., App. 17a-53a) (TR VOL 9 of 9:138-141, App. 14a-16a).

Another serious inadequacy of the post-trial hearing was the denial of Petitioners' right to participate fully and present relevant evidence. As Justice O'Connor observed in her concurring opinion in *Smith* v. *Phillips*, *supra* at 221: "A hearing permits counsel to probe the juror's memory, his reasons for acting as he did, and his understanding of the consequences of his actions. A hearing also permits the trial judge to observe the juror's demeanor under cross examination and to evaluate his answers in light of the particular circumstances of the case." It is unconscionable to place the burden to prove prejudice upon the Petitioners and then deny the Petitioners the only effective means to establish such prejudice. The trial judge's denial of Petitioners' repeated requests to question all jurors and others (9/30 TR 27, 169-170, App. 23a-24a, 49a-50a) denied the Petitioners an adequate hearing under *Smith* v. *Phillips* and *Remmer*. The request that all jurors be summoned to the hearing was not a mere fishing expedition on the part of counsel. The record clearly demonstrates that at least five jurors had witnessed the picture taking incident (9/30 TR 102, 122, App. 41a-44a) and all jurors were aware of Juror

Deaton's meetings with the trial judge about the incident (9/30 TR 99, App. 38a-39a). Once a juror feels that he may be subjected to violence at the hands of the defendant, it is extremely difficult for his judgment to remain free and impartial as the constitution requires. *United States* v. *Barnes*, 604 F.2d 121, 140 (2d Cir. 1979). "Impartiality is not a technical conception. It is a state of mind." *United States* v. *Wood*, 299 U.S. 123, 149 (1936). Yet the trial judge denied defense counsel any opportunity to inquire into each juror's state of mind. In place of summoning the other jurors, the trial court had Juror Deaton offer his opinion and impression of the other jurors' states of mind in violation of Fed. R. Evid. 606(b), *Rushen* v. *Spain*, slip op. at 7, n. 5. (9/30 TR 90-91, App. 34a-35a). The Fourth Circuit previously condemned the use of *ex parte* affidavits at post-trial hearings. *United States* v. *Guthrie*, 387 F.2d 569, 572 (4th Cir. 1967). The situation is aggravated when the statements which are not subject to cross-examination do not come directly from the jurors but come second hand from the impressions of one juror. The "model" (see *Allen* v. *United States*, 376 F. Supp. 1386 (E.D. Pa. 1974)) for proper post-trial hearings was established in *Morgan* v. *United States*, 399 F.2d 93 (5th Cir. 1968) where the court required: "(1) a full hearing at which counsel were free to introduce any evidence relevant to the alleged conversation; (2) separate questioning of each juror by the trial judge; (3) cross-examination of the panel members by counsel. . . ." *Id.* at 97.

Petitioners have been unable to locate any case where the trial judge refused to examine jurors who were aware of third party contacts with the jury and had knowledge of private communications between the judge and a single juror. The only cases approving the trial judge's refusal to interrogate jurors are based on waiver or a lack of factual evidence that the jury has any knowledge of extraneous matters. For example, *United States* v. *Aimone*, 715 F.2d 822 (3rd Cir. 1983) and *United States* v. *Spinella*, 506 F.2d 426 (5th Cir. 1975) both involve defense counsel's acquiescence in the trial court's decision that all jurors would not be interrogated. As the court held in *Aimone*, *supra*, at 830, counsel "may not promote action by

the trial judge and then assign that compliance as error. 'Sandbagging' will not be countenanced by this court." There is no form of waiver or acquiescence in this case as Petitioners at all times asserted their right to examine all jurors who were aware of the contact and communication with the jury. (9/30 TR 174, App. 50a-51a).

There is no lack of factual evidence establishing third party contact with the jury in this case. The courts have recognized that a full hearing is not required in every instance where an uncorroborated rumor or conjecture came to the attention of the trial court. *Tillman* v. *United States*, 406 F.2d 930, 938 (5th Cir. 1969); *United States* v. *Brown*, 571 F.2d 980 (6th Cir. 1978); *Capella* v. *Braumgartner*, 59 F.R.D. 312 (S.D. Fla. 1973). The present case does not involve conjecture or any factual dispute regarding the extent of jury contamination. The record is clear that several jurors were directly involved in the photographing incident (9/30 TR 122, Ap. 44a) and all jurors were aware of Juror Deaton's meetings with the trial judge about the incident (9/30 TR 99, App. 38a-39a). Every court which has confronted such a situation has permitted questioning of "each of the jurors who was aware of the *ex parte* communication . . . ." *United States* v. *Fleming*, 594 F.2d 598, 608 (7th Cir. 1979); *Krause* v. *Rhodes*, 570 F.2d 563 (6th Cir. 1977); *United States* v. *Khoury*, 539 F.2d 441 (5th Cir. 1976); *United States* v. *Schrimsher*, 493 F.2d 848 (5th Cir. 1974); *Bailey* v. *United States*, 410 F.2d 1209 (10th Cir. 1969); *Morgan* v. *United States*, 399 F.2d 93 (5th Cir. 1968); *Stone* v. *United States*, 113 F.2d 70 (6th Cir. 1940).

It is the paucity of information relating to the entire situation coupled with the presumption which attaches to the kind of facts alleged by Petitioners which manifest the need for a full hearing. *Remmer* v. *United States*, 350 U.S. 377 (1956).

The case of *Krause* v. *Rhodes*, *supra*, is particularly relevant to the present case. In *Krause* the court held that "it was error for the trial court to determine *ex parte* and without any personal interrogation that a juror who had been threatened . . . could continue to serve unaffected by these incidents." *Id.*

at 569. Although the trial judge in the present case dealt with Juror Deaton's apprehension, the judge refused to examine the other jurors who also felt threatened and shared Juror Deaton's apprehension (9/30 TR 95, App. 37a-38a and Judge Britt's Order dated 11/8/82, Ap. 8a). The procedure utilized in the present case was the very procedure condemned in *Krause*. "No attempt was made to determine whether the remainder of the panel had been possibly contaminated. Instead, they were merely told that efforts had been made to influence one of their number, with alarming references to the extreme seriousness of the threats, and were left to speculate about the entire matter." *Id.* at 569. The jurors at Petitioners' trial felt threatened (9/30 TR 95, App. 37a-38a); they received only second hand reassurances from Juror Deaton. There was no disclosure as to the source of the possible threat or what remedies the trial judge had utilized to protect them. The jurors could only speculate as to the source, nature, and extent of the threat. It is only speculation that the other jurors were sufficiently reassured as Juror Deaton claims he was. But there is no evidence as to their reassurance or continued fear except for Juror Deaton's "opinion" and "impression" as to their state of mind (9/30 TR 90-91, App. 34a-35a). Such conjecture by Juror Deaton cannot dispel the very real possibility that some, if not all, the jurors either continued to fear the defendants or were angry at the defendants for having engaged in efforts to intimidate the jury. Juror Deaton candidly admitted that he did not ask nor did he know whether the other jurors felt as assured as he (9/30 TR 93, 100, App. 36a-37a, 39a-40a).

Proper concern for protecting and preserving the integrity of our jury system dictates against speculation about the dispersion of the cloud created by both F.B.I. and judicial *ex parte* contact while jurors sat for the remainder of the trial and cast their ballot.

If the situation were reversed and the Petitioners relied solely on one juror's impression of other jurors (e.g. "I think they were all afraid."), it is difficult to believe that a court

would decline to interrogate all the jurors to determine whether the Petitioners had conclusively carried their burden of proving actual prejudice. However, the trial judge here accepted such conjecture as conclusively establishing the absence of prejudice, thereby cutting off the Petitioners' right to properly inquire into possible prejudice. *Smith* v. *Phillips*, 455 U.S. 209 (1982) is premised on the principle that "preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." *Id.* at 216. The denial of Petitioners' opportunity to present evidence deprived the Petitioners of the due process hearing mandated by *Remmer* and *Smith* v. *Phillips*.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be granted.

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Dated: January 11, 1984

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-5274(L)

UNITED STATES OF AMERICA,

Appellee,

v.

RONALD DOYLE HINES,

Appellant.

No. 82-5275

UNITED STATES OF AMERICA,

Appellee,

v.

GARY J. PEED,

Appellant.

No. 82-5276

UNITED STATES OF AMERICA,

Appellee,

v.

TERESA ELEAZAR,

Appellant.

No. 82-5277

UNITED STATES OF AMERICA,

Appellee,

v.

JAMES MAURICE JACKSON,

Appellant.

No. 82-5278

UNITED STATES OF AMERICA,

Appellee,

v.

JAMES C. CODDINGTON,

Appellant.

No. 82-5286

UNITED STATES OF AMERICA,

Appellee,

v.

JEFFREY CRAIG BUMGARDNER,

Appellant.

Appeals From The United States District Court For The Eastern District Of North Carolina, At Raleigh. W. Earl Britt, United States District Judge.

Argued: July 14, 1983 Decided September 9, 1983

Before PHILLIPS, SPROUSE and ERVIN, Circuit Judges.

William J. Sheppard (Elizabeth L. White on brief) and Gary S. Lawrence (Steven D. Kupferberg; Hugh Clifton Talton, Jr.; Christine Witcover Dean; Edwin C. Walker on brief) for Appellants; William E. Martin, Assistant United States Attorney (Samuel T. Currin, United States Attorney, Wallace W. Dixon, Assistant United States Attorney, James G. Lindsay, U.S. Dept. of Justice on brief) for Appellee.

IX.

One day during the trial, an FBI agent photographed persons leaving the courthouse and was noticed by juror Denton. Juror Denton advised the court and was informed that the photographs were not being made of jurors, that there was no cause for concern, and that the matter should be disregarded. At a post-trial hearing on the possible prejudicial influence of the picture-taking episode, juror Denton indicated that after receiving the court's assurances, he was not concerned about the photographing and the incident did not affect his deliberations. Nor was the incident further discussed by him or the other jurors after he conveyed the court's assurances to the other jurors. The district court considered Denton's testimony credible and found that the episode had no prejudicial influence on the jury. That finding is not clearly erroneous. Under *Smith* v. *Phillips*, 455 U.S. 209 (1982), and *Remmer* v. *United States*, 350 U.S. 377 (1956), appellants were entitled to a hearing, which they received, on the possible prejudicial impact of the episode. Absent a showing that the district court's finding of no unfair prejudice was clearly erroneous, we cannot reverse.

X.

For the foregoing reasons, the convictions are

AFFIRMED.

No. 82-5278

UNITED STATES OF AMERICA,

Appellee,

v.

JAMES C. CODDINGTON,

Appellant.

No. 82-5286

UNITED STATES OF AMERICA,

Appellee,

v.

JEFFREY CRAIG BUMGARDNER,

Appellant.

ORDER

Upon consideraton of the appellants' petition for rehearing, by counsel,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Ervin for a panel consisting of Judge Phillips, Judge Sprouse, and Judge Ervin.

For the Court
/s/ William K. Slate, II
WILLIAM K. SLATE, II
CLERK

FILED
NOV 14 1983
U.S. Court of Appeals
Fourth Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

No. 82-8-CR-5

UNITED STATES OF AMERICA,

v.

JEFFREY CRAIG BUMGARDNER, *et al.*

ORDER

This matter is before the Court on motion of defendants for a new trial based on an incident occurring during the trial involving the jury.

FACTUAL BACKGROUND

The trial was begun at 10:00 a.m. on 24 August 1982 with the selection of a jury consisting of twelve regular and two alternate members. On 25 August 1982, the jury was impaneled and the trial begun. During the course of the trial, the names of Costello Ramey and Doug Ross were mentioned as suppliers of drugs to the organization in which the defendants were involved. On 1 September 1982, Costello Ramey and Doug Ross were called as witnesses by one of the defendants and each took the fifth amendment. Court adjourned at 4:30 p.m. on that date, and shortly thereafter juror, Bryant Deaton, reported to Susan Umstead, law clerk for the presiding judge, that someone was taking pictures of jurors as they left the courthouse. Mr. Deaton was brought into the Judge's Chambers and, at that time, advised the Court that as he and some of the other jurors were leaving the main entrance of the courthouse an unidentified individual sitting in a car parked at the curb in front of the courthouse appeared to be taking pictures of the

jurors. Mr. Deaton further informed the Court that he had taken down the license number of the automobile. The Court, thereupon, took the slip of paper on which the license number was written down by the juror, advised the juror that he would look into the matter and excused him. Immediately thereafter, the Court requested an FBI agent to come to chambers. Agent Albert P. Koehler responded, and he was advised of the incident and requested by the Court to immediately investigate the matter and report back to the Court as promptly as possible.

At approximately 8:00 a.m. on 2 September 1982, Agent Koehler came to chambers and reported to the Court that the photographs were being taken by another FBI agent, James J. Roche, Jr., of the two suspected drug dealers, Ramey and Ross. When juror Deaton arrived at court, he was brought to chambers by Susan Umstead, law clerk for the presiding judge, at which time he was advised that the Court had ascertained the identity of the photographer. The Court further assured the juror that photographs were not being made of jurors, that there was no cause for concern by him or any other juror, and that he should disregard the incident entirely. The Court further advised juror Deaton that the Court was not at liberty to discuss the matter further at that time but could possibly do so at some later date.

On 3 September 1982 at 10:00 a.m., the jury retired to begin its deliberations. At 7:23 p.m. the jury returned its verdict. Before leaving the courtroom, juror Deaton inquired of the Court further concerning the picture-taking incident. The Court again advised juror Deaton that it was not at liberty to discuss the matter further at that time but would, at a later date should he make further inquiry. The jury was then discharged and the Court advised the parties of the incident and what had transpired thereafter.

Motions for a new trial based on alleged prejudice resulting from the picture-taking incident have been filed by all defendants. On 30 September 1982, a hearing was conducted at which

time Agents Koehler, Roche and Susan Rowley, who was in the automobile with Agent Roche at the time of the incident, and juror Deaton testified. All were examined initially by the Court and all defense counsel were given an opportunity to question the witnesses.

CONTENTIONS OF THE DEFENDANTS

The defendants contend first, that the Court erred in not bringing the matter to their attention at the time it occurred and conducting a hearing involving one or more of the jurors and secondly, that the cause of the defendants was prejudiced by the incident. Defendants principally rely on *Remmer* v. *United States*, 347 U.S. 227 (1954) and *Smith* v. *Phillips*, ___ U.S. ___, 71 L.Ed.2d 78 (1982).

DECISION

The presence of cameras of all varieties in and about the courthouse is an everyday occurrence. In the Eastern District of North Carolina, the taking of photographs in the courtroom, court offices, or in corridors immediately adjacent thereto is prohibited by local rule. Local Rule 8.00, E.D.N.C. The courtroom in the Raleigh Courthouse is located on the seventh floor of the Federal Building. Although the local rule prohibits the taking of photographs on the seventh floor, it is not unusual for photographers to be stationed in the lobby where the elevators empty and out in front of the courthouse. Thus, the taking of photographs of participants in a court proceeding if not an everday occurrence is, at least, not an unusual occurrence.

Remmer involved a situation where a remark had been made to a juror during trial that the juror could profit by bringing in a verdict favorable to the defendant. *Smith* involved a situation where a juror had made application for employment in the prosecuting attorney's office while serving as a juror in the case. Other cases brought to the attention of the Court or disclosed by its own research involve contact with or by a juror. None have been found in which it has been contended that the jury was prejudiced because of an event not directly involving a member of the jury panel.

The Court's concern at the time of the incident was first, to determine who the photographer was and second, to alleviate any fears on the part of the juror that there was any threat to his safety or well-being. Both of these objectives were accomplished with a minimum of effort and without disruption of the trial. When questioned, juror Deaton testified that he had no apprehension or concern for his safety. He further testified that the incident did not in any way affect his deliberations or decision as a juror and that he felt that it did not in any way affect the decision of the other jurors. He specifically testified that after the Court assured him there was nothing to be concerned about that the matter was not mentioned by him or any of the jurors again.

The burden is on defendants to show bias on the part of the jury. *Smith* v. *Phillips*, *supra*. This they have failed to do.

Defendants contend that the Court should have required all of the jurors to be brought in as witnesses and subjected to examination by the Court and cross-examination by the attorneys. The Court disagrees, finding that the testimony of the juror was not mentioned again during the course of the trial or jury deliberations. That being true, it is inconceivable to the Court that any of the other jurors, not directly involved in the incident, could have been prejudiced or influenced in any way.

The motions for new trial are denied.

AND IT IS SO ORDERED.

This 8 November 1982.

/s/ W. Earl Britt
W. EARL BRITT
United States District Judge

APPENDIX C

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Rule 30. Instructions. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

Rule 43. Presence of the Defendant. (a) *Presence Required.* The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

(b) *Continued Presence Not Required.* The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived his right to be present whenever a defendant, initially present,

(1) Voluntarily absents himself after the trial has commenced (whether or not he has been informed by the court of his obligation to remain during the trial), or

(2) After being warned by the court that disruptive conduct will cause him to be removed from the courtroom, persists in conduct which is such as to justify his being excluded from the courtroom.

(c) *Presence Not Required.* A defendant need not be present in the following situations:

(1) A corporation may appear by counsel for all purposes.

(2) In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial, and imposition of sentence in the defendant's absence.

(3) At a conference or argument upon a question of law.

(4) At a reduction of sentence under Rule 35.

Rule 606. Competency of Juror as Witness. (a) *At the Trial.* A member of the jury may not testify as a witness before that jury in the trial of the case in which he is sitting as a juror. If he is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) *Inquiry into Validity of Verdict or Indictment.* Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

File No. 82-8-CR-5

UNITED STATES OF AMERICA

v.

JEFFREY CRAIG BUMGARDNER
GARY J. PEED
RONALD DOYLE HINES
TERESA ELEAZER
JAMES MAURICE JACKSON
JAMES C. CODDINGTON

Trial Before
The Honorable W. Earl Britt
United States District Judge And Jury

Taken At:
The United States Courthouse
Federal Building
310 New Bern Avenue
Raleigh, North Carolina

Taken On:
Friday, September 3, 1982

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Pages 1 to 142

* * *

[124] courts. So if any of you feel that you are in any way discriminated against as a result of your jury service, just let me know and communicate with me or with the clerk of this court. And I will see that something is done about that or I will advise you what you can do about it.

Your notes that you took, little note pads that you had, you may keep those if you desire. If you don't want to keep them, you may leave them in the juryroom and we will dispose of them. They are yours to do what you want to with. It's up to you.

When you start to leave, my law clerk will give you an envelope that will contain in it a questionnaire. Since being on the bench for some 2 and ½ years now, I have developed and revised this questionnaire for my use and the use of others associated with me in the court process, to try to make the life of jurors a little easier. And the responses from some of your fellow citizens before you has made it a little easier for you, I hope, by getting some refreshments in the juryroom and a few other things that probably have occurred as a result of questionnaires to other jurors.

So, the information you can give me there will be helpful to me and to others in the court system. If you don't mind filling it out and sticking it back in that self-addressed envelope and stick it in the mail and return it to me. However, if after 2 solid weeks of late August and early [125] September, you've had enough of this federal court, you may throw it in the first trash can you see and you need not worry about the marshal coming after you. I promise you I won't do anything.

Finally, to say that it's been my pleasure to serve as your presiding judge during this 2-week period and I feel like I've gotten to know you quite well. And I invite any of you to come by to see me if you are in Raleigh and in or about the federal court, I will be glad to talk to you about your jury service in general or the court system in general.

When you leave, if you left your wraps or whatever in the juryroom, you may go by and pick them up. I must ask also that

you turn your little jury buttons back in. This is a period of austerity, you know, where we're trying to protect the dollar and we have to make that go further. So if you will, turn that in to the marshal or the law clerk as you leave. And you may now go with my thanks.

THE MARSHAL: May I approach the bench, your honor?

THE COURT: Yes, sir.

(Unreported bench conference.)

THE COURT: Members of the jury, an inquiry was made during the trial to me by one of your number concerned about some of you leaving the courthouse one day and [126] someone snapping pictures out at the curbs and one that was in an automobile. As I told Mr. Deaton the following morning, I investigated that matter and determined that there was nothing to be of any concern to any of you about what happened. I found out the source of it, what it was and I assure you that it's nothing to jeopardize any of your health, welfare or security.

If any of you desire to learn more about that, you may communicate with me in private later and I will be happy to discuss it with you further.

All right. You may now leave.

(The jury was excused and exited the courtroom at 7:42 p.m.)

THE COURT: What happened to the clock up there? It stopped sometime. Mr. Wingo, do you have the pre-sentence reports?

MR. WINGO: Yes, your honor.

THE COURT: On all defendants? Before you pass them out, let me make some inquiry. You can put mine on up here.

I do not propose to pass sentence tonight. With that in mind and particularly with regard to you out-of-state lawyers, I will be glad to hear you as to when.

MR. KUPFERBERG: Your honor, I would be available at the court's discretion and I'm not sure a full

* * *

[137] are. Defendant Peed will be required to file a $25,000.00 unsecured bond because he is the only one that is on a personal recognizance.

All defendants will be required to report to the nearest probation office, not less frequently than once a week, except of course, Mr. Jackson.

MR. SHEPPARD: Mr. Jackson is in their hands 24 hours a day, judge. And got more people waiting for him.

THE COURT: I will advise you when the sentencing will be scheduled. And you want to get any motions considered at that time, I suggest you get them in early and submit them accompanied by briefs in support of them.

MR. WALKER: Your honor, can I inquire for Mr. Bumgardner right now, who is having to report to the marshal's office every day. Is he the—is this report to the probation office in addition?

THE COURT: Yes, sir, that was not a change.

MR. WALKER: Thank-you, your honor.

MR. LAWRENCE: Your honor, with respect to Mr. Peed, can we have until Tuesday to post that bond because of the lateness of the hour?

THE COURT: No, sir. The clerk is—it's worse on her than it is on you. She says she will stay and get it ready.

MR. SHEPPARD: If it please the court, I [138] realize the lateness of the hour, but I am very very concerned about the communication with the marshal and the court and this photographing situation.

THE COURT: All right. I'll state everything I know for the public record.

MR. SHEPPARD: I would appreciate it.

THE COURT: I did not do it at the time it occurred because I didn't feel that it would have been proper to do so.

The juror, Mr. Bryant Deaton, reported to the court one day during the trial, I don't remember the exact date, some concern over the fact that as he and, I believe, he said the two alternate jurors. One of them, I believe, is sitting back there now, were leaving the courthouse, that they observed someone sitting in a car at the curb taking photographs, apparently of them. And for that reason, they were somewhat concerned about it.

And Mr. Deaton stepped on by the car and got the license number and brought that to me. That was the only communication between Mr. Deaton and myself and it was in the presence of my law clerk or somebody, one of the law clerks. In any event, I told him I would look into it and not to worry about it.

I then called agent Al—I called—I had my law clerk to have the FBI report to my office. I had agent Al [139] Kohler who came to my office — K-O-H-L-E-R — and told him what had transpired and to be sure to check into it. And the next morning at 8:30, he reported to my office and had determined who the person was who was taking photographs, the reason for it and the fact that it was not of the jurors and had nothing to do with the jurors.

And he satisfied me of that. At this time, I'm not at liberty to say what else he told me, but it had nothing to do with freedom or liberty of any of these defendants or their rights to a fair trial. And I simply communicated then to Mr. Bryant Deaton, in the presence of my law clerk again, that I had determined much what I told here in the courtroom, that I had checked into it and had determined that it was not involving them, that the person taking photographs was not attempting to take photographs of them. And that he should not be concerned.

MR. KUPFERBERG: I might indicate to the court that I, myself, had some photographs taken of me as I was leaving the courtroom—the courthouse and so was Mr. Coddington. And in fact, I called the police, that I was so apprehensive of that

situation. The guard downstairs told me because they're outside of federal property, that he could not investigate the situation. And would indicate to the court, that eventually we did find out who it was and that they were, in fact, involved in a corollary of this case. I didn't know [140] it was the jurors.

THE COURT: Well, I haven't said anything about what was done. The only thing I've said is, that what my determination of the matter was, that it had nothing that would, in any way, affect or jeopardize the right of any of the defendants to a fair trial in this case or that involved the safety or well-being of any of the defendants, as far as I know, any of the lawyers or any of the jurors. At the time, I was concerned only, of course, with the jurors.

MR. KUPFERBERG: That was one of the reasons I was concerned, your honor.

THE COURT: So, at the appropriate time, I will be glad to discuss it further with anyone. At the appropriate time that I feel that I can. I can't right now.

MR. SHEPPARD: Could you make that appropriate time, your honor, set the hearings or the sentencings and what have you, at a time after that appropriate time, so that we might determine—my concern is that if a juror walks out of the United States Federal courthouse and people are taking photographs of them, in a case where they're talking about people getting knocked off and what have you, they think that it's the defendants. And I'm concerned about the court's finding without a hearing that it does not deprive the defendants of a fair trial. Perhaps it does and there may be more in this than we think. I've never run into the problem [141] and I appreciate the court disclosing to us what you have, so that we might be able to do some research and determine the appropriateness of proceeding to get to the bottom of it. But it concerns me. I don't know who was taking pictures, but it surely is offensive.

THE COURT: All right. Let's take a recess.

(The proceeding was adjourned at 8:00 p.m., sine die.)

APPENDIX E

[5] PROCEEDINGS 9:30 A.M.

THIS CAUSE CAME ON FOR SENTENCINGS BEFORE THE HONORABLE W. EARL BRITT, UNITED STATES DISTRICT JUDGE, AT RALEIGH, ON THURSDAY, SEPTEMBER 30, 1982, AT 9:30 A.M.

THE COURT: Madam reporter, we are here for the purpose of hearing motions and sentencing hearings in the cases of Jeffrey Craig Bumgardner and others, 82-8-CR-5. Mr. Bumgardner himself is not here. And Mr. Walker, if you will state for the record what you told me in chambers a moment ago about your client?

MR. WALKER: Your honor, I have been informed by the marshal's office that on the way to the airport last night, Mr. Bumgardner was arrested for driving while intoxicated and is presently in the Duval County Jail.

THE COURT: Okay. Well, as I have indicated to you, we will go ahead with the motion hearings and everything which, of course, you may fully participate in. And I have a sentencing in a related matter in Fayetteville next week, I think. You can check with the law clerk and get the day and time. And see if you can [6] get him sobered up and out of jail and up here for that. If not, we will send the marshall and let him explain it.

All right. I think the best thing for me to do is to go through the motions of the respective defendants seriatim and do what I am going to do. I have read the written motions and memoranda, *et cetera*. It is my intention to rule on the motions as submitted, with the exception of the motion for a new trial, *et cetera*, with regard to the picture incident, on which the court has arranged for witnesses to be here and to take testimony and hear arguments concerning that.

MR. TEW: Your honor, may I inquire as to whether or not the court intends, in fact, to conduct such a hearing?

THE COURT: Yes.

MR. TEW: I would request at this time your honor, that the agent or agents who were present and the equipment that they used be present during the hearing, so that the record can reflect what, in fact, they did and what, in fact, they had at the time the incident occurred.

THE COURT: Well, the agents will be here, counsel. I am not sure about the equipment. I will make a determination on that when I hear their testimony. I have arranged for them to be here.

* * *

[17] evidentiary.

Do you have evidence that you think needs to be submitted?

MR. TEW: No, sir. I just want to recount for the court the evidence that was presented.

THE COURT: Well, no. I heard the trial Mr. Tew. I was here. No, sir. I can't do that in fairness to the other attorneys. The motions of the defendant Teresa Eleazer for a new trial and for acquittal under rule are denied.

The motions of the defendant James Coddington numbered 4 in his document to incorporate the motions for a new trial filed by co-defendants is allowed. The court will conduct a hearing on the second motion, in which it is alleged the government intimated and prejudiced the jury when its agents were instructed to take pictures of the participants of the instant trial, which included at least two members of the jury panel.

Intimidation of the jury and counsel was so severe it caused counsel for defendant Coddington to call the Raleigh Police Department to investigate the taking of the former pictures.

The court will, as I have indicated, conduct an evidentiary hearing on that. Otherwise, the Motion of the defendant Coddington for a new trial is denied.

* * *

[20] MR. KUPFERBERG: May I ask the court for a sequestration, your honor?

THE COURT: Pardon me?

MR. KUPFERBERG: May I ask the court for a sequestration of all witnesses? I believe at least there was two people in that automobile. And they are both here.

THE COURT: All right. Mr. Koehler, I want you to come around the take the stand. And the other FBI agents who were involved in this please remain out in the hall. We will call you when we need you.

MR. SHEPPARD: Your honor, on behalf of Defendant Jackson, may I ask the court to set in the record—I don't really know what is happening, and I don't think the record does either.

I know that when I made inquiry at the conclusion of the trial who was taking photographs, the court's response—and I think I can quote it—is "I am not at liberty to say." Now we are back n the record. And everybody knows who this fellow is. But defendant Jackson's attorney doesn't. And there is obviously something going on here that I don't know about.

THE COURT: Mr. Sheppard, if you will give me time, I will try to explain it to you.

MR. SHEPPARD: Thank you, your honor.

[21] (Whereupon, Albert B. Koehler was called as a witness, duly sworn, and testified as follows:)

THE COURT: All right. I think I have stated most of this for the record during the course of the trial or afterwards.

MR. SHEPPARD: Your honor, on behalf of defendant Jackson, I object to the court reciting facts in the presence of the witness after the rule of sequestration has been invoked.

THE COURT: Well, the objection is overruled, Mr. Sheppard.

MR. SHEPPARD: Yes, sir.

THE COURT: The court recalls that during the course of the trial juror number 1 in the back row, Mr. Bryant Deaton, indicated to either the marshal or one of the law clerks that as

he and the two alternate jurors, as I recall, were going to lunch that it appeared that somebody was taking their photograph from a car parked at the curb in front of the Federal Building, in which the courthouse is located; that he—that is, Mr. Deaton—walked around the front or back of the car and observed the license number, wrote it down, and then went on to lunch.

[22] I had the juror, Mr. Deaton, brought into my chambers; and in the presence of my law clerk or the marshall or both inquired of him what had happened. He told me substantially what I have just repeated. And he handed Mr. Marshal the paper on which he had written down the license number. I thanked him and told him I would look into the matter. And nothing further was said.

I then immediately had my law clerk to call the FBI to send someone down. In response to that, Agent Albert Koehler came to my chambers. And I recited to him approximately what I have recited in this courtroom at this present time.

Mr. Koehler returned to my chambers the next morning and reported to me in substance that he had determined that the people in the car were FBI agents; that they were taking photographs of the two witnesses—or attempting to—who had testified during that day, who had been called during that day, and who were suspects in the pending drug operation; that there was no intention to take photographs of anyone else. I thanked Mr. Koehler and he departed.

I then, as I recall, had the juror Mr. Deaton—well, I had told Mr. Deaton to check with me the next morning. And he checked with my law clerk, as I recall. And I asked him to come into my chambers. And I advised [23] him that the court had determined who was doing the photographing; and that the photographing was not intended to be of jurors and should not be taken by him as directed toward him in any way. And it was something that he was not to be concerned about and not to worry about at all.

At the end of the trial, then, as I recall, in open court—the record will show exactly what happened—one of the jurors made some inquiry as to what the court had determined what the picture-taking incident was or something to that effect. I have got exactly what was said.

But in any event, as I recall, I also told the entire jury panel that the incident did not involve them in any way and was something they should not be concerned about in any way; and that I was not at liberty at that time to tell what I knew about it; that I had determined the true facts of the situation; and that if they cared to look into it further later, if they would contact me I would be glad to discuss it with them.

Quite frankly, the court perceived the incident as one in which the jurors expressed some possibilities of fear for their safety, maybe, and wondering what the event was about. And when I determined that there was no reason for them to have any fear of their [24] safety, I felt that that was the proper place to put an end to it.

The question has now been raised as to whether that incident in any way prejudiced the trial of these defendants. And for the purpose of exploring that further, the court has set this *Remmer* hearing and will follow the procedure of bringing such witnesses to the stand whom I will question. And then I will allow counsel to question them also.

MR. TEW: Your honor, at this time, if you are through, I would respectfully like to make a motion.

THE COURT: All right.

MR. TEW: I would move that your honor respectfully recuse himself for this reason: You are, in effect, a participant in it. And obviously, you determined at the time the incident occurred that it had no effect because you allowed the matter to go to the jury.

You have recited matters in the record which, in effect, makes you a witness subject to testifying under oath and

subject to cross-examination by counsel. Therefore, I feel that it would be only fair, appropriate and proper that this court allow some impartial judge who has no knowledge and has certainly not participated to make the determination as to what effect, if any, the events [25] had upon the jurors.

THE COURT: I take it the rest of you counsel would like to join in that motion?

MR. SHEPPARD: The defendant Jackson joins.

MR. KUPFERBERG: Yes, sir.

THE COURT: The Motion is denied.

MR. KUPFERBERG: Your honor, may I inquire as to one fact that your honor stated—that you did, in fact, call Mr. Koehler. Could your honor explain to counsel how your honor determined that the FBI was involved in this?

THE COURT: I will get into that right now. You will see.

MR. KUPFERBERG: All right. Thank you, your honor.

MR. SHEPPARD: Your honor, may I make two other inquiries to the court with regard to the factual recitation? I am confused. You stated that jurors expressed the possibility of fear for safety. But I only heard you talking about one juror communicating with the court.

THE COURT: No, sir. No, sir. I said that I perceived it. My perception of the whole incident was only that there might possibly have been—no juror has told my anything about any fear of safety.

[26] MR. SHEPPARD: Thank you, your honor. The second thing, your honor: You said at the end of the trial that a juror asked about the problem.

THE COURT: That was from the jury box. Whatever was said was said here in your presence. The record will reflect exactly what it was.

MR. SHEPPARD: Well, I am not sure the record is going to reflect which juror. And what I am trying to establish is that it

was not Mr. Koehler that made the inquiry at the conclusion of the trial, if that is the court's recollection. That is mine.

THE COURT: There is no juror named Koehler.

MR. SHEPPARD: I mean—excuse me—Mr. Deaton.

THE COURT: Well, I don't know who it was. The record will reflect, I take it.

MR. KUPFERBERG: It was my understanding, your honor, that it was the foreman.

THE COURT: Sir?

MR. KUPFERBERG: It was my understanding that the marshal indicated it was the foreman.

MR. SHEPPARD: Who was not Mr. Koehler—I mean Mr. Deaton. But I am not sure the record does reflect. That is why I am asking.

THE COURT: Mr. Franklin Wright was the [27] foreman. I am not expressing any comment at this time as to who made the inquiry at that time. If the record doesn't reflect, then something will have to be done to cure it.

MR. SHEPPARD: Well, maybe now is the time to try and cure it, rather than four years from now, judge.

THE COURT: Well, Mr. Sheppard, the only way I know is we will ask Mr. Deaton when he comes in. And if he doesn't know, the only other way is to subpoena all the other jurors. And I am not prepared to do that right now. How else do you propose?

MR. SHEPPARD: I think that the *Remmer* case and the *Smith* v. *Phillips*, decided at the last term of the United States Supreme Court, contemplates exactly that. That is my point.

THE COURT: Well, I disagree.

MR. SHEPPARD: Someone has evaluated what we need. And I think that bolsters Mr. Tew's position. I can't conclude that it was anyone other than the court that has evaluated what we need for the hearing. And we as lawyers—

THE COURT: (Interposing) That is exactly right, Mr. Sheppard. I do think it is important for somebody to evaluate what is needed. And if after [28] this hearing I feel that it is necessary to inquire of any of the additional jurors, then I may very well do that.

MR. SHEPPARD: Fine.

THE COURT: If you lawyers will give me an opportunity to proceed with what I am trying to do without second-guessing me before I even get a chance to open my mouth.

MR. SHEPPARD: Judge, respectfully, I am not trying to second-guess anybody. I am trying to represent my client.

THE COURT: Just have a seat, Mr. Sheppard. Have a seat.

EXAMINATION 10:12 A.M.

BY THE COURT:

Q. Mr. Koehler, do you recall when the court called you to chambers during the course of this trial?

A. Yes, your honor; I do. It was in the late afternoon.

Q. All right. Was anyone with you?

A. Yes. When I came to your office, it was Special Agent Judson Wray.

Q. All right. As best you recall, please recount for the record what the court told you and what you told the court.

[29] A. Yes, your honor. I came into your office. And you said that a juror during a trial that you were presently involved in thought that someone was taking photographs outside of the Federal Building; and that the juror had written down what he thought was the license number of the vehicle that two individuals were parked in taking the photographs.

He thought it might have been somebody taking a photograph of him—the juror—and that he was walking with an alternate or a juror when he was coming out at lunch breach.

Q. Do you recall any response you made to me at that time?

A. Yes. I told your honor that we would immediately try to find out who was taking the pictures; and if it was possible, if we needed to interview the juror that we could do so. And you said to attempt to determine who it was, and then that if need be that you would make arrangements to have the juror interviewed the next morning. And I said we would know who it was by tomorrow morning.

Q. Do you recall whether I gave you anything?

A. Yes. You gave me a slip of paper which I believe you said was what the juror had written down or what was the license number. I believe it was ZTL 488 [30] with a North Carolina plate. And I believe that even the color of the car was on it. It was a dark sedan.

Q. All right. What did you do then?

A. Well, I immediately went down to our office on the sixth floor of this building here and ran a Department of Motor Vehicle check on the license number that was handed to me. And it was not in file. And I looked at the number. And I believe it was "ZTL" which was written down.

And when it was not in file, it occurred to me that most of our FBI cars in the Raleigh area are prefixed by "ZLT." And I figured the juror might have gotten it backwards in his haste to write the number down.

And I checked our list. And it was one of our vehicles with the letters reversed. And it was assigned to agent Jim Roche. And I knew that he works narcotics matters from our office. And I got a hold of Mr. Roche. And he said yeah, he was outside the building on that afternoon attempting to take a photograph of two witnesses who had either testified that day or at some time during the course of the trial.

He said he was trying to get a picture of one of them because he already had some photographs of the other. But they were together. And he was attempting to try to get a photograph of

one because of an ongoing [31] narcotics investigation. He had no photograph of that individual.

He was in a car with a United States customs agent—a female customs agent.

Q. What was her name?

A. I don't recall her name right now, sir. She was in the courtroom. He also said that he did recall that a juror walked by at the time he was taking a picture. because he had been present—Mr. Roche had been present in the courtroom for some of the proceedings and had recognized the juror walking by.

He said he was certainly not taking a picture of the juror. And he does recall the individual walking by the car—the juror walking by the car with, I think he said, a female alternate. And he said he could understand why they thought that he was taking a picture of them, because they walked in front of the two individuals he was trying to take a picture of.

I then brought Mr. Roche up to your honor's office the next morning. And he reiterated that he was, in fact, the individual that was taking the pictures.

Q. Did he say who the witnesses were whose picture he was seeking to take?

A. Yes, your honor. But I don't recall their names right now. I think he said he was one of them that [32] took the Fifth during the proceedings.

Q. All right. Now, the next morning you state that you came to my office and reported back to me?

A. Yes, your honor. It was about 8:30 in the morning.

Q. Did you tell me at that time substantially what you have told here?

A. Yes, your honor.

Q. At any time, did you make any contact with any of the jurors?

A. No, your honor. I told you at that point it would not be necessary for us to talk to the jurors.

THE COURT: All right. Mr. Dixon, do you want to ask him any questions?

MR. DIXON: No, sir.

MR. KUPFERBERG: Yes, Sir.

CROSS-EXAMINATION 10:17 A.M.

BY MR. KUPFERBERG:

Q. Do you know why the photographs were not taken in the courthouse?

A. No, I don't.

Q. Are you aware there is a rule against taking photographs on Federal Courthouse property?

THE COURT: Well, why don't you confine

* * *

[57] Q. Was Agent Rowley under the driver's—

A. (Interposing) she was.

Q. Was the driver? During the course of the time that you were attempting to take photographs, do you recall ever having in focus any of the jurors or a person you recognized as a juror?

A. Yes, sir; I do.

Q. Tell me about that. How did it happen? And what did you do?

A. At the time of day that it was—approximately quarter of 5:00, to the best of my recollection—I was sitting in the passenger side of this automobile with the window rolled down. It was parked in the second parking meter west of the newspaper boxes.

And the traffic exiting the Federal Building was fairly heavy. I had been given the camera by the individual in the office who is familiar with that kind of thing. I am not familiar with cameras. I know if you push a button, it takes a picture. Other than that expertise, I have none.

So I was attempting to set the focus so that I could clearly see the individuals who were exiting the doorway of the building some distance from me, among which I recognized jurors—most of which had buttons still on them when they came out of the door. I recognized some [58] defendants and defense attorneys, all of which or during which part of the time I probably had the lens up to my eye attempting to correct the focus of the camera.

I did not photograph any juror or defense attorney. I was not interested in it.

Q. Whom did you photograph?

A. I attempted to photograph Brown Costello Ramey and Douglas Freeman Ross. I attempted, in a humorous vein, to photograph assistant United States Attorney Dixon. None of my pictures were successful.

Q. None were?

A. Well, if you judge a picture on clarity and focus and identifiability—no; none were.

Q. When you developed the pictures, were there any photographs of jurors?

A. None that I could recognize.

Q. Do you recall how many occasions you were out in front of the courthouse taking pictures?

A. Just that one occasion on that one date at that time.

Q. Well, during the course of this trial of the *United States* v. *Bumgardner and others* to which we are referring, were you in front of the courthouse of anyplace around the courthouse taking any photographs that may have been in the presence of any of the jurors in that case?

[59] A. Yes, sir.

Q. When and where?

A. On the date we have been referring to—

Q. (Interposing) Other than on that date?

A. No, sir. No, sir. That was the only occasion I was out there or anybody else was out there under my supervision.

THE COURT: Mr. Dixon?

CROSS-EXAMINATION 10:50 A.M.

BY MR. DIXON:

Q. Who had instructed you to go take photographs or attempt to take photographs?

A. No One.

MR. DIXON: No further questions.

THE COURT: Mr. Kupferberg?

CROSS-EXAMINATION 10:58 A.M.

BY MR. KUPFERBERG:

Q. When were you first aware that Mr. Ross and Mr. Ramey were going to be at the courthouse?

A. I can't tell you what day, sir.

Q. Who made you aware of that?

A. I don't know.

Q. Did you just happen to be sitting in on the

* * *

[84] MR. ROCHE: Yes, sir.

THE COURT: Bring the juror Mr. Deaton in please.

(Whereupon, Bryant Lee Deaton was called as a witness, duly sworn, and testified as follows:)

EXAMINATION 11:28 A.M.

BY THE COURT:

Q. MR. DEATON: I have asked you to come here today to ask you some questions concerning the trial of the case of the *United States* v. *Jeffrey Craig Bumgardner and others*, which you served as a juror in. And you will recall that during the course of that trial, you reported a photograph taking incident to one of my law clerks. Do you recall that?

A. Yes; I do.

Q. Tell me as best you can recall what happeened on that date.

A. One afternoon after leaving the court walking through the main entrance doors, I observed an individual sitting in a brown Chevrolet—it appeared to be—taking pictures. Now, I really didn't know if he was taking pictures of the jurors—of several of us walking together [85] or if he was taking a picture of someone in front of us or behind us. It didn't really matter to me. I just wanted to know. So I walked around to the back of the car and took the license number down on a checkbook and brought it back up to you.

Q. All right. And now recall as best you can what you told my law clerk. Did you tell my law clerk essentially what you just told me?

A. Yes; I did.

Q. Do you recall anything different that you told the law clerk then other than what you have just summarized?

A. No. I think that is all I really knew about it—that someone was taking pictures. And I think I may have described that there was a female driving the car. This person was sitting on the passenger side. And I really didn't get a good look at the person. That was about it.

A. All right. And did the law clerk shortly come back and bring you to my chambers?

A. Immediately.

Q. All right. Do you recall what was said in my chambers?

A. Yes. You said you would look into it immediately; that you were concerned about it; and that you [86] wanted to assure me that you would take whatever action necessary to find out; and that you would get back with me as soon as possible. And so, you know, the next morning when I came in, you called me—

Q. (Interposing) Wait a minute. At that time—was anything else said that day between you and me, the best you recall?

A. No, sir.

Q. My law clerk, Ms. Umstead, I believe was in the chambers with us at that time?

A. Yes, sir.

Q. All right. Now, the next morning you say you were called into my chambers again.

A. Yes.

Q. All right. Now, do you recall what was said the next morning?

A. You said that you had looked into the matter and that you wanted to assure me that there was nothing that I should be concerned about, nor any of the other jurors; and that you would discuss this with me after the trial; that you would prefer not to now. And I said, "fine."

Q. Is that all that was said?

A. Yes, sir.

Q. All right. Do you recall who, if any, other [87] jurors were with you at the time you went out that door?

A. I don't remember. It seems like one of the alternates that we had.

Q. A lady?

A. Yes. And I don't remember which one right now. As I was walking up toward the car and walked behind to record the license plate number, I made the statement, "well, you saw that, too." But I don't know if I even said anything to you about that. But I just remember that statement.

Q. All right. Do you recall any photographing incident occurring before or after that?

A. No.

Q. Did anybody during the course of the trial or since the trial make any comments to you about the photographing incident that you recall?

A. No; not at all.

Q. Did you talk with any of your fellow jurors about it?

A. Yes; I did.

Q. Do you recall who or how many or all of them or what?

A. I think in just general conversation after I left your chambers the morning you told me you had looked into it. I went back and just sort of in general [88] mentioned what had taken place; and that you had assured me everything was okay.

Q. Well, do you recall thereafter whether it was discussed by any of the jurors or not?

A. No, sir. It never was mentioned again.

Q. It was not mentioned again?

A. No, sir.

Q. Was it mentioned at all during your deliberatons—during the time you were deliberating the guilt or innocence of the defendants?

A. No, sir.

Q. As a result of that incident, did you at any time have any apprehensions or fear for your safety?

A. No; I didn't.

Q. Did you have any apprehensions or concern about your serving on the jury?

A. Not at all.

Q. Following the verdict and the taking of the verdict here in court, someone made an inquiry about the incident. Do you recall that being in open court?

A. After the—

(Interposing) Verdict?

A. Yes; I.

Q. Were you the one that did that?

A. Yes.

[89] Q. What is your recollection of what I told you at that time?

A. You said that—you basically repeated to me at that time what you had said in your chambers—that you wanted to assure us that everything was okay; that you had looked into it; and that our safety was not—

Q. (Interposing) Threatened?

A. Threatened.

Q. Did I at that time disclose to you the source of the photographing incident?

A. No, sir; you didn't.

Q. Have you as of yet found out the source of the photographing incident?

A. No. That is one of the things that I was hoping that I would be able to get clarified today.

Q. Did you inquire of me when you first got here this morning?

A. Yes.

Q. Did I tell you anything?

A. No. You said that you would prefer not to discuss it.

Q. Now, Mr. Deaton, do you feel, having been extensively questioned by the judge before you proceeded to serve as a juror on this case concerning your qualifications and the importance of having a fair and an [90] impartial jury; and considering the evidence you heard in the case and my instructions to you as to the law—that the incident that occurred on that day in any way had any effect whatsoever on your verdict as a juror in this case?

A. No. After you assured me that you had looked into it and I felt like you knew the source. Then It was no longer a concern for me. Now, I think had I not had that reassurance, it may have been a problem. But in this case, it was not.

I didn't think anymore about it. I was curious, you know. And that is why I asked after the deliberations.

Q. And you say after you went back following my assurance and told the other jurors what you had determined that it was not discussed among you as jurors after that?

A. No.

Q. All right. Well, based on your total involvement with the jurors—and this case lasted what, approximately two weeks?

A. Yes, sir.

Q. Based on your total involvement with the jurors, do you have any feeling or any reason to believe that it had any impact at all on the jury totally—the deliberations of the jury in the trial of this case?

[91] MR. TEW: Objection. I object to the question, your honor.

THE COURT: The objection is overruled. You may answer.

THE WITNESS: It is my opinion that it did not have.

BY THE COURT:

Q. Do you recall when during the course of the trial that was? I suppose the time gets confusing over a period of time.

A. I don't remember. I think it was in the second seek. But I am not even real sure of that. It just sort of happened. And it was over.

Q. Through your communications with me, Mr. Deaton, was my law clerk Ms. Umstead present at all times?

A. Yes, sir.

Q. Was anyone else present?

A. I don't think so.

THE COURT: All right. I am going to allow the attorneys in the case now to ask you some questions about this. So try to answer them as truthfully and forthrightfully as you can. Mr. Dixon?

MR. DIXON: I don't have any, your honor.

MR. KUPFERBERG: Your honor, may I for the purpose of expediency reserve my cross so as not to [92] duplicate other counsel?

THE COURT: Yes, I was going to start at the opposite end and let Mr. Walker start.

MR. WALKER: No questions, your honor.

THE COURT: All right. Who have we got next down there—Mr. Talton?

CROSS-EXAMINATION 11:40 A.M.

BY MR. TALTON:

Q. Mr. Deaton, I believe you testified that this did not effect any of the other jurors—this picture-taking incident—the other jurors; is that correct?

MR. TEW: Objection.

THE COURT: Overruled, Mr. Tew.

Q. THE WITNESS: That was my opinion; yes.

BY MR. TALTON:

Q. Had you discussed this with any jurors after this time?

A. The only thing I can recall is that immediately after returning from the judge's chambers, I went back in and relayed the message that he had given me, because before I had walked into the office, I had sort of just briefly told them what I was going in there for.

So when I went back in, I explained that the judge said everything was okay. So then in my best [93] memory, that was the last it was discussed.

Q. So really, you don't know what went on in the minds of the jurors when you told them that or what?

A. No; I don't.

MR. TALTON: No further questions.

THE COURT: Mr. Tew?

CROSS-EXAMINATION 11:41 A.M.

BY MR. TEW:

Q. Can you relate what you became concerned—not by the fact that the pictures were taken, but the fact that there were being taken caused you to be concerned? Can you verbalize that concern?

A. Well, I think given the nature of the case, that I was concerned that there might be some reason that someone would like to know something about the jurors or have pictures of them made. I think it is a natural reaction.

Q. Your concern basically was for your own personal welfare; was it not?

A. Yes; it was.

Q. Would it be safe to say that you were somewhat scared?

A. I think that is—I was scared. Well, yes, sir; sounds good.

[94] Q. When you first saw Judge Britt and discussed this with him, where were you?

A. We were in his chambers.

Q. Who else was present?

A. The law clerk.

Q. Which one?

A. That young lady.

THE COURT: Susan Umstead.

BY MR. TEW:

Q. Was anyone else present at that time?

A. Not that I recall.

Q. How long did this conversation last?

A. In total, I think it must have been ten—maybe eight to ten minutes or somewhere in there, because I originally came in looking for the marshal. And she said I should—I cornered her. I said, "where is the marshal?" And I sort of explained what I needed. She said, "Well, I think we ought to go see the judge." So that is the only reason it took that amount of time.

Q. The fact that you were escorted in to see the judge about this photographing session—did that cause you an even greater concern about what had been going n?

A. No; not at all.

Q. The fact that the judge as opposed to the marshal?

[95] A. I just thought he would have been too busy to have handled it.

Q. And I believe, if you will relate again—didn't you talk with the other jurors immediately after talking with Judge Britt about what had taken place?

A. Yes; I did.

Q. Can you relate any specific remarks that any particular juror made at that time?

A. I will summarize what I think the feeling was. I don't remember particular remarks, I think some of them, were, just as I was, concerned. And then when I came back and relayed the message, it was not discussed.

Q. But at the time—

A. (Interposing) I don't remember any specific remarks.

Q. But their concern, then—your testimony is their concern was basically the same as yours? And that is your personal welfare and safety?

A. Yes.

Q. When you were questioned by Judge Britt initially, can you recall what he asked you specifically?

A. Well, he appeared to be concerned. He said he would look into it immediately. And he would get right back with me. That is the general—I don't remember.

Q. But do you recall the questions that he asked

* * *

[99] A. No; I don't recall.

Q. Now, did you tell any of the other jurors that you had gotten the license number of the car?

A. Yes. In fact, just before I walked into the judge's chambers—you know, I had just come in myself. And I sort of relayed what took place the afternoon before briefly. I said I had gotten the license number and given it to the judge. The judge was going to look into it and was supposed to get back to me immediately.

About that time, Susan came in and said, "the judge wants to see you." So I walked out.

Q. Would it be a fair statement to say that every member of the jury panel was aware of the fact that you and possibly others had possibly been photographed as they were leaving the courthouse?

A. Yes.

Q. And would it be a fair statement to say that every member of the jury panel knew that you had gone to the trouble to get the license number of the car and reported this to the court.

A. Yes.

Q. And would it be a fair statement to say that to the best of your knowledge, you were the only one who personally received assurances from the court that there was nothing to worry about?

[100] A. Yes.

Q. So any assurances that the other jurors might have received came through you from the judge?

A. Yes.

Q. All right. Now, did you specifically ask the other jury members whether or not that had allayed all their fears?

A. No.

Q. So you don't know whether or not they felt as assured as you did?

A. No.

MR. LAWRENCE: I have no further questions.

THE COURT: Mr. Sheppard?

CROSS-EXAMINATION 11:50 A.M.

BY MR. SHEPPARD:

Q. If it please the court—good morning, sir. When you first experienced this incident, you have indicated you had concern? And then it was developed it was concern for safety and other concerns? Who did you think would be the perpetrator of anything that would affect your safety? What was going on in your innermost mind as to who was behind all this—you are in a lawsuit and you are a juror—the United States of America or the defendants sitting over here at these tables?

[101] A. The defendants?

Q. It didn't enter your mind at all that the government would be doing you bodily harm?

A. No.

Q. And I realize you have been very tasteful in communicating it. But I want to be sure that I understand what was going on in your mind. Is this an accurate summary of what your apprehension was: That someone was taking photographs of the jurors, so that if they voted "guilty" that someone might come do them bodily harm?

A. Yes, sir.

Q. That was what you were afraid of?

A. Yes.

Q. And that fear abided with you for a period of time?

A. Until the next morning; yes.

Q. Well, a period of time overnight?

A. Okay.

Q. It abided with you during that period of time, from the afternoon experience until you had your communications with the court?

A. Yes.

A. And you took the court's word for it that it knew what was going on and would control it, even if it [102] didn't know what was going on?

A. Yes.

Q. Could you hear any mechanical noise, such as the shutter on the camera as you were experiencing this incident?

A. No.

Q. Could you estimate as best as possible the number of individuals—as you put it, you were kind of "the leader of the pack," meaning that you were walking physically in front of at least a portion of the jury. Can you tell me approximately how many members of the jury observed you as the leader of the pack leading the pack to go look at the tag number on a car or get a tag number of a car, and who would have been in earshot of the other juror who said, "you saw that, too"?

How many members of the jury were you talking about there?

A. There were only five or six of us that were going out together. And of that group, I don't remember except for that comment I have stated twice before, that anyone really at that time paid any attention to it.

Q. But you couldn't say that they didn't?

A. No; I couldn't.

Q. Pick up on what was going on and out of further apprehension, didn't want to let anybody know they

* * *

[106] really discussed that extensively?

A. No.

Q. Other than—pardon me?

A. Yes. That was my testimony.

MR. SHEPARD: No further questions, your honor.

THE COURT: Mr. Kupferberg?

CROSS-EXAMINATION 11:59 A.M.

BY MR. KUPFERBERG:

Q. MR. DEATON, would it be fair to say that the judge never told you that this incident had nothing to do with this case?

A. That is fair.

Q. So up until this morning, you were still under the impression that this photographic taking session had something to do with this case?

A. Would you like to know what I really felt, or just answer "yes" or "no."?

Q. Well, I would like you to answer "yes" or no" and then go ahead.

A. Okay. Repeat that again. Let me make sure I get it.

Q. Would it be fair to say that up until this morning, you were under the impression that this [107] photographic taking session had something to do with this case?

A. Yes.

Q. Explain.

Q. My assumption was after the judge had said that everything was okay that it was something to do with either the SBI or the FBI or some law enforcement agency.

Q. Why did that come to your mind?

A. Well, I guess it is just sort of a deduction. I believe my immediate thought—"well, if it wasn't the defendants, then it must be the prosecutor."

Q. And when you made that deduction, what caused you to make the deduction as far as why the FBI would be taking pictures of the jury?

A. Well, I don't know if there is a lot of logic to it. That is just what I thought.

Q. Did you feel that the government might have been taking pictures of the jury because they wanted to have a record of who sat on this case?

A. No. I guess that what I really had in mind or might have thought was that well, maybe it was somebody in front of me or behind me. Maybe it wasn't actually me that they were taking a picture of. Maybe it was—

Q. (Interposing) You came to that assumption

* * *

[116] A. 12 to 15 inches.

Q. So you are describing that there was lens on this camera, a long lens of 12 to 15 inches sticking out from the 35 millimeter camera; is that correct?

A. That is correct.

Q. Would you describe the size of the 35 millimeter camera as a camera that is approximately 3 inches by 5 inches and is rectangular and about an inch and a half thick without that 12to 15-inch telescopic eye—lens?

A. I would.

Q. Mr. Dixon came upon the scene at some stage of the program and communicated with you; did he not?

A. Yes, sir; he did.

Q. What did he say?

A. I don't remember the exact words.

Q. Give me your best recollection of the substance of the conversation with Mr. Dixon.

A. As I have testified, sir, he inquired as to the nature of what I was doing out there. And I informed him. And then he thereafter informed me that Ross and Ramey were in the marshal's office and would be on their way dowm thereafter.

Q. Kind of wished you well in your venture?

A. I don't recall him doing that.

* * *

[122] citizen?

A. Yes, sir.

Q. Is it your testimony that on the occasion as you were focusing the camera as people were exiting the front door of the Federal Courthouse that you observed buttons on the lapel of some or on the clothing of some?

A. Yes, sir.

Q. And not buttons that you put in buttonholes, but a different kind of button? Would you describe that button?

A. It was a button of approximately the size of a quarter, white background and, I believe, perhaps blue letters. And it said "Juror".

Q. "J-U-R-O-R?

A. Yes, sir.

Q. In your mind's eye, can you recall approximately how many of those buttons came into your field of vision on the afternoon of this incident?

A. Half a dozen.

Q. How long have you worked in the Federal Building in Raleigh, North Carolina, approximately?

A. Since the date shortly after it opened.

Q. And from your working in this building, do you know what those buttons represent?

A. That that individual is on a jury.

* * *

[141] jury, as well as my advice to my client in this case, had some effect or was affected by the people out in the car. I can candidly tell your honor that I didn't know who those people were.

THE COURT: I understand. What do you mean? Well—

MR. KUPFERBERG: (Interposing) And that I was told by agent Johannesen after I had called the police—he had come down in the elevator. And I said, "who are the people outside taking pictures?" And before he had even looked outside, he told me it was the FBI.

THE COURT: Well, tell me how that affected your advice to your client. What do you think could be proved by this witness that would enhance that any?

MR. KUPFERBERG: After he found out it wasn't Ross or Ramey—which that was my fear originally—and we found out it was the FBI, the question was posed to me by Mr. Coddington, "why are they taking my picture?" I said, "Jim, I really cannot explain that to you, because I am not real sure."

He said, "well, could it be that there will be some repercussions?" And I said, "well, I can't tell you. I would assume that there might be some repercussions. And they want your picture for some particular reason."

[142] and the reason I assume that is I have had discussions with an FDLE Agent involved in this case—and I am sure Mr. Dixon was present—when there was some discussion as to whether they should seize his car as part of the penalty in this case—a number of things.

THE COURT: Well, none of that—it doesn't seem to be, Mr. Kupferberg—goes to the question of whether he has had a fair trial or not or relating to any motion before me.

MR. KUPFERBERG: Well, it was part of the discussion as to whether he should take the stand in his own defense and whether there would be repercussions for his testimony by the government by placing further charges against him.

I am not saying that that was a major issue. But we did discuss it. And it was discussed particularly because of this FBI issue.

THE COURT: Are you telling me—are you representing to this court as an officer of the court that the defendant did not take the witness stand because of that incident?

MR. KUPFERBERG: What I am telling your honor is that it was part of the discussion. The reason he didn't take the stand was a cumulative effect of what the evidence was. And I think your honor knew why we were participating [143] the way we were in this trial. I have made that fairly clear from the outset.

But I can tell the court with all candor that I would never have called the police in this case had I not felt that there was some possible harm either coming from Mr. Ross or Mr. Ramey to me because I had found them for Mr. Coddington.

THE COURT: I can understand that. And as it may relate, if I had a matter before me of investigating the FBI for what they did, Mr. Kupferberg, I can understand its relevance.

But unless you can tell me that your man didn't take the stand because of it or gave up some right that he had or if it in some way impinged his right to a fair and impartial trial or that it affected this jury in some way, then I fail to see the relevance of it at this hearing.

MR. KUPFERBERG: Well, I can with all honesty tell you that it did impair his trial just from the testimony of this witness. And I am not sure which way your honor is going to lean as far as the juror himself saying that he was scared of the defendants in this case. We are not talking about a murder case. We are talking about a drug case.

I can tell you that we did have a discussion [144] as to what evidence we would put on and what relevance the FBI taking pictures of Jim Coddington had. I couldn't give him an answer why they took his picture. And I don't think the court can. And I am not sure that anybody else can.

But out of all the people in this case, there was a juror who had a camera pointed at him. I can tell your honor that my wife also had the camera pointed at her. But I can tell you that they took a picture of Mr. Coddington, knowing full well that he was

a defendant in this case, and did so with such an attitude—and the reason I asked the question about laughing was it gave him the impression that there was something more to it than just them kidding around.

And I had no explanation for it. I don't think—to be candid with the court, I am not sure that this gentleman here can give an explanation. And I am not really sure Ms. Rowley can give an explanation.

But what I am trying to say to the court is that there is a fine line that the court has to say, "well, we are not going to let this happen," because of the apparent impropriety just from the mere fact that it was done. And what effect it may have had on his presenting evidence or not, I couldn't tell you whether it was 10 percent or 2 percent or 1 percent, your honor.

[145] And I am not going to tell your honor that it had any percentage difference, because of what I presented to your honor as to the reason that we were sitting here and not in the court trial and sitting, as opposed to a jury trial. I can't tell your honor that.

But I can tell your honor that I didn't know it was an FBI car; that I was apprehensive; and that it scared the hell out of me as well as Mr. Coddington at the time it was done. And the fact that a photograph was taken, I think, is rather significant.

What I would like to do is put Ms. Rowley on the stand and ask her about the picture taken of Mr. Coddington, their repartee during that period of time, and that is it.

THE COURT: All right. Bring her in.

MR. KUPFERBERG: I think the court should also inquire of Mr. Johannesen as to his rule in this.

MR. TEW: Your honor, in line with that and further along those lines, prior to the court making any determination as to the effect of this, either as it may have affected the deliberations of the jurors or as misconduct by the government in the conduct of the case, I would request that the court initiate an investigation into it.

And the reason is this, your honor: we have [146] got a man who has been investigating for years who testifies, somewhat incredibly, that he can't operate a camera to do an important act. And his recollection of things is so convenient and to me certainly does not explain a lot of things. We have got a contradiction—

THE COURT: (Interposing) Mr. Tew, you say you are requesting that I investigate it?

MR. TEW: I request that this court order an investigation into that to determine the origination of it and the location of things, such as the roll of film or the documentation of those things.

THE COURT: For what reason? With regard to what pending motion I have in this court do you want that done?

MR. TEW: Your honor, in the sense of fair play and justice, in that these defendants are entitled to a fair and impartial trial. And if it is attributable to the prosecution, then that goes another step further.

And I don't know. I can't determine from the testimony that we have, which I feel is somewhat inherently incredible and contradictory, that this court or anybody could make a fair determination as to who ordered or participated.

THE COURT: Well, okay. I understand [147] your position. Young lady, come around and be sworn, please.

(Whereupon, Susan Rowley was called as a witness, duly sworn, and testified as follows:)

MR. KUPFERBERG: Your honor, there is a rule on witnesses. I ask that Mr. Roche not remain in the courtroom.

THE COURT: He has already testified.

MR. KUPFERBERG: I understand that, your honor if there happens to be something that comes out of the mouth of this witness that has to be clarified—

THE COURT: (Interposing) All right, Mr. Roche. Step outside the courtroom, please.

EXAMINATION 1:50 P.M.

BY THE COURT:

Q. State your name, please, Ma'am.

A. Susan Rowley

Q. Spell your last name.

A. R-O-W-L-E-Y.

Q. By whom are you employed?

A. United States Customs Service out of Wilmington, North Carolina.

* * *

[169] event mention the taking of photographs for the purposes of identification or files?

A. No.

MR. TEW: No further questions.

THE COURT: Mr. Talton?

MR. TALTON: No questions.

THE COURT: Mr. Walker?

MR. WALKER: No questions, your honor.

THE COURT: You may step down, young lady.

(Witness excused.)

THE COURT: All right. At this time, does any—well, Mr. Kupferberg, I guess I am still with you. You requested that I call this one. Do you have any further witnesses you request to call in this matter?

MR. KUPFERBERG: I think it is incumbent on the court—the court is going to make a decision in this case based upon the opinion of this particular juror. Whether the court can do that

or not, I am not real sure. And I think the court must call the other jurors in and inquire of them. I think that is incumbent upon the court. It might not be. In my opinion, it is.

And although it may cause us to come back once again—

THE COURT: So you would like the other [170] 11 jurors called?

MR. KUPFERBERG: Yes.

MR. SHEPPARD: 13.

MR. KUPFERBERG: 13, your honor, and Mr. Johansson, I think. If I could proffer something to the court, again. I was standing out there. And he never went out and looked at these people who were out in the car. I said, "who are they?" And he said they were the FBI without looking at them. So he knew that they were out there.

I was standing in the lobby next to the elevators. And I said, "there are two people out there taking pictures. I am scared that they might be Ross and Ramey's men. Who are they?" He said, "they are the FBI" without even looking.

THE COURT: So you contend that that would go toward prosecutorial misconduct? Is that your contention?

MR. KUPFERBERG: Yes, your honor. I think there is a fine, fine line of impropriety that one must not tamper with a jury, whether it is intentional or not.

THE COURT: No doubt about that. All right. So you would request that I call the other jurors and Agent Johansson. Mr. Sheppard?

MR. SHEPPARD: Defendant Jackson has the

* * *

[174] THE COURT: (Interposing) Be that as it may, I admit that I carried the central role. I would state for the record—

MR. SHEPPARD: Your honor, I am not saying that is a legal error. I am just suggesting that part of the problem here, judge—and I say this respectfully—was the non-disclosure to

defense counsel, so that the court can't be in any position other than a defensive position, having read *Smith* v. *Phillips* and *Remmer* now. And if this occurred tomorrow, I bet you would disclose to the defense lawyers, so that it would be resolved at that time.

It is almost as subtle as what effect does looking down, you know, or into a lens of a camera that you don't know whether it has even got film in it. I would suggest to you, your honor, that if I sat back here in this courtroom and clicked a camera that it would have the same effect whether it was loaded or unloaded.

So whether there was a picture taken or not is irrelevant. It is the play of the camera that has the effect. Now, what effect? If it had the effect on the one juror that it did, it seems to me that it has that potential of the effect on the remaining 13.

If that juror's apprehensions were allayed by your honor's personal reassurance that nothing is wrong, how can we then speculate that everyone else's

* * *

[179] When we come in here at the very beginning and the first thing we start out with is that the defendants are presumed innocent and the government has to prove beyond a reasonable doubt as to every element of the offense to which you are charged; and in the middle of the trial you get one juror who thinks that he has been photographed and that there is some physical harm that is going to come to him because of one of these defendants; and once that is in his mind and he thinks about it for one full day—he goes home and sleeps over it—I don't think there is anything you can do to erase that.

You may assure him that none of these defendants are going to come and bump him off in the middle of the night. But that does not change the tainted image that he has against these defendants.

He has made up his mind now that these are bad people who are going to hurt him. And it has nothing to do with whether or

not they are guilty of what they are charged here. And I think that is one of the key issues here.

And the other key issue is the conduct of the government. As the court is aware by now, my wife was photographed or at least the camera was pointed at her. I left these proceedings and went back to my office and worked for a couple of hours. She conveyed to me the fact [180] that she had been photographed leaving the courtroom (sic) and had not gone to the trouble of taking down the license number. And my first response was "don't worry about it."

But I can assure the court that my assurance to her did not change her concern. Later that night when I talked to Mr. Kupferberg and found that he had talked with Agent Johansson and it was the FBI, and once I explained all that to her, then she felt better about it. But the fact was still in her mind, what were these people doing out there photographing.

And that had to be in the minds of the jury—not just this one man here, but every one of them and especially the lady. I mean, if they thought these defendants were out to harm them, I don't think there is any assurance that the court can give all of them, let alone just give one of them and have him convey it to the rest of them.

THE COURT: Mr. Lawrence, let's suppose that was a news photographer sitting in that car. Would your position be any different?

MR. LAWRENCE: Your honor, if they walked out there and there was a car sitting there that had "WRAL-TV" on it—

THE COURT: (Interposing) No Let's

* * *

[188] I suggest that those decisions are important to keep in mind, that the court in this case did not take the prosecution into its counsel in trying to look into the matter of whether a juror had been improperly influenced in one way or other. The court has conducted a hearing. And there is testimony on the record from that hearing that this particular juror was more than satisfied, I would infer from his statements and his demeanor this morning testifying. Learning from you that nothing was wrong, he was more than satisfied; and that that had no effect on his deliberations and had no effect on his verdict.

So with those distinctions that I submit should be drawn, I would ask you to bring this thing to a close and make a decision without the necessity of bringing 13 other jurors.

THE COURT: All right. Let's move along now. Each of you defense attorneys have been provided, have you not, with the pre-sentence reports? Any of you did not get yours?

Mr. Walker, I realize your client is not here. And if you don't care to participate any further, that is all I am going to conduct the rest of the day—the sentencing hearings. If you want to stay and be part of it, you may, of course. But since your client is not here, you don't have to.

No. 83-1138

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GARY J. PEED
and
JAMES C. CODDINGTON,

Petitioners,

v.

UNITED STATES OF AMERICA

SUPPLEMENTAL APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-5274 (L)

UNITED STATES OF AMERICA,

Appellee,

v.

RONALD DOYLE HINES,

Appellant.

No. 82-5275

UNITED STATES OF AMERICA,

Appellee,

v.

GARY J. PEED,

Appellant.

No. 82-5276

UNITED STATES OF AMERICA,

Appellee,

v.

TERESA ELEAZAR,

Appellant.

No. 82-5277

UNITED STATES OF AMERICA,

Appellee,

v.

JAMES MAURICE JACKSON,

Appellant.

No. 82-5278

UNITED STATES OF AMERICA,

Appellee,

v.

JAMES C. CODDINGTON,

Appellant.

No. 82-5286

UNITED STATES OF AMERICA,

Appellee,

v.

JEFFREY CRAIG BUMGARDNER,

Appellant.

Appeals from the United States District Court for the Eastern District of North Carolina, at Raleigh. W. Earl Britt, United States District Judge.

Argued: July 14, 1983 Decided September 9, 1983

Before PHILLIPS, SPROUSE and ERVIN, Circuit Judges.

William J. Sheppard (Elizabeth L. White on brief) and Gary S. Lawrence (Steven D. Kupferberg; Hugh Clifton Talton, Jr.; Christine Witcover Dean; Edwin C. Walker on brief) for Appellants; William E. Martin, Assistant United States Attorney (Samuel T. Currin, United States Attorney, Wallace W. Dixon, Assistant United States Attorney, James G. Lindsay, U.S. Dept. of Justice on brief) for Appellee.

ERVIN, Circuit Judge:

Ronald Doyle Hines, Gary J. Peed, Teresa Eleazar, James "Bubba" Jackson, James Coddington and Jeffrey Bumgardner appeal from the United States District Court for the Eastern District of North Carolina wherein they were tried for conspiracy to possess with intent to manufacture and distribute cocaine in violation of 21 U.S.C. § 841(a)(1) and of using a communication facility to facilitate the cocaine conspiracy in violation of 21 U.S.C. § 843(b).

Viewing the evidence in the light most favorable to the government, the prosecution's case at trial established the existence of a two-tier conspiracy. The first tier was headquartered in Apex, North Carolina, under the command of James "Jacques" Provost. Jacques had two investors or partners in the first tier, Gary Peed of Virginia and James Coddington of Orlando, Florida. The first tier had three employees who acted as drug couriers, Jacques's son Darryl Provost, Peter Stisser, and Bubba Jackson. Darryl and Peter turned government witnesses and provided the crucial trial testimony against their co-conspirators.

The second tier was the smaller and local operation in Jacksonville, Florida, including Ronald Hines, Jeffrey Bumgardner and Teresa Eleazar. Contacts between the two tiers were made by Bubba Jackson, Eleazar's brother.

The jury found appellants guilty of both counts, except that Eleazar was acquitted on the telephone facilitation count. Peed, Coddington, and Jackson were sentenced to four years imprisonment plus five years probation. Hines, Eleazar and Bumgardner received six months imprisonment with five years probation.

On appeal, the appellants claim nine reversible errors in their trial. Finding no merit to any of the challenges, we affirm.

I.

In September, 1980, a double murder occurred in Jacksonville Beach, Florida. In July, 1981, two Jacksonville Beach

police investigators, Officers Dorn and Maxwell, learned that "Bones" Merrill might have acted as a lookout during the murders. Bones was questioned and agreed to act as an informant in the investigation of Jacques Provost, who was suspected of having ordered the murders to avenge a delinquent drug debt and is now deceased.

Beginning on July 27, 1981, Bones made seven or eight consensually recorded phone calls from pay telephones in Jacksonville Beach to Jacques's home in St. Johns County, Florida, which was outside Dorn's and Maxwell's bailiwick. Since most of the information obtained concerned Jacques's ongoing drug operations, on July 29, 1981, the information was turned over to Agent Alford of the Florida Department of Law Enforcement, an agency with statewide jurisdiction.

On August 29, Alford obtained an electronic surveillance warrant for Jacques's St. Johns County home. Alford eventually learned that Jacques had moved the center of his drug operations to a house in Apex, North Carolina.

Alford passed the information on to Agent Johannesen of the Federal Drug Enforcement Agency ("DEA") in Raleigh, North Carolina. Johannesen used the information to obtain a wiretap on Jacques's telephone in Apex from September 29, 1981 to October 14, 1981. Information developed from the wiretap led to the indictments of the appellants.

Appellants complain that the Apex wiretap evidence should have been suppressed because it was the fruit of the Florida consensual monitoring and electronic surveillance, which appellants contend were illegal. *See Wong Sun* v. *United States*, 371 U.S. 471 (1963). The consensual monitoring allegedly was illegal because officers Maxwell and Dorn were operating outside their jurisdiction. Appellants challenge the electronic surveillance on the grounds that it was issued based on an affidavit that contained intentional, reckless, and material misrepresentations.

Appellants contend that Maxwell and Dorn, Jacksonville Beach police officers, acted outside their jurisdiction by con-

sensually monitoring Bones's nine pre-August 6, 1981 calls to Jacques's St. Johns County home. Maxwell and Dorn were not deputized in St. Johns County until August 6, 1981. Appellants rely on *Wilson* v. *Florida*. 403 So.2d 982 (Fla. 1980), in which Lake City, Florida, police officers conducted an investigation into Wilson's possession of drugs outside the municipal limits of Lake City. In conducting the investigation, the officers employed an electronic listening device that was hidden on an informant who purchased drugs from Wilson outside Lake City. The court held that fruits of the electronic surveillance could not form the basis for the issuance of a search warrant because the officers were without authority to conduct the investigation.

Wilson, however, is distinguishable from the present case. In *Wilson*, the investigation was into the possession of contraband outside Lake City. The *Wilson* court indicated, 403 So.2d at 984, that it would have reached a different result had the investigation been into Wilson's illegal acts within Lake City: "a municipal police officer . . . may conduct investigations outside the city limits . . . where the subject matter of the investigation originated inside the city limits, *State* v. *Chapman*, 376 So.2d 262 (Fla. 3d DCA 1979); *Parker* v. *State*, 362 So.2d 1033 (Fla. 1st DCA 1978)." Here, the subject matter of the investigations, the 1980 double murder in Jacksonville Beach, did originate within the city limits.

Of the nine pre-August 6 telephone calls, the first seven or eight were made from Jacksonville Beach, so Maxwell and Dorn were within their jurisdiction. Furthermore, since Dorn and Maxwell brought agent Alford, who had statewide jurisdiction, into the investigation on July 29, the monitoring of Bones's calls from Jacksonville were under the direction of Alford; *i.e.* the officers acted "under color of law," 28 U.S.C. § 2511(2)(C), or "under the direction of a law enforcement

officer," Fla. Stat. 934.03(2)(c).[1] Thus, the pre-August 6 calls comply with both the federal and state consensual monitoring statutes.[2]

Appellants contend that the application of agent Alford for the Florida wiretap contained material misrepresentations which were intentionally and recklessly made and which were necessary to the finding of probable cause and, thus, that the Florida wiretap evidence was illegally seized under *Franks* v.

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[1] 18 U.S.C. § 2511(2)(C) provides:

> It shall not be unlawful under this chapter for a person acting *under color of law* to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

Fla. Stat. 934.03(2)(c) provides:

> It is lawful under this chapter for a law enforcement officer *or a person acting under the direction of a law enforcement officer* to intercept a wire or oral communication when such person is a party to the communication or one of the parties to the communication has given prior consent to such interception and the purpose of such interception is to obtain evidence of a criminal act.

[2] It is unnecessary to decide the government's claim that the Jacksonville monitoring was valid because Dorn and Maxwell were "special deputies" in Jacksonville. Fla. Stat. § 30.09(4)(B) permits special deputies to conduct investigative work. The district court did not decide the question, but simply stated that "the officers may have had special deputy status [within Jacksonville] and, if so, the Jacksonville calls would have been within their jurisdiction."

We also do not reach the government's argument that the appellants have no standing since none of them had possession or privacy interests in the consensually monitored telephone calls and none of the conversations involved any of the appellants; *i.e.*, they were neither victims nor targets of the consensually monitored calls. *See* 18 U.S.C. § 2510(11); *Alderman* v. *United States*, 394 U.S. 165 (1969). The district court did not address the argument and it is not clear whether it was raised below.

Delaware, 438 U.S. 154 (1978). The alleged misrepresentations are that (1) Bones was a collector of drug debts for Jacques, (2) Bones revealed that Jacques imported drugs and was putting together an airplane scheme involving 15 kilograms of cocaine, (3) Jacques told Bones that he had some "heavy business", wanted Bones to work for him, and was meeting with some business associates to plan a large transaction, (4) Bones and Jacques discussed the details of a trip down south, (5) Jacques told Bones that he was waiting for a phone call and would know more after he received it, and (6) Darryl Provost told Bones that there was a change of plans and Bubba Jackson was going up north to collect some money.

Our review of the record, however, indicates that the alleged misrepresentations either did not occur or were immaterial: (1) during an August 3, 1981 interview of Bones by Maxwell and Dorn, Bones indicated that he collected drug debts in New York and Atlanta for Jacques; (2) during the August 3 interview, Bones and the officers discussed the plane deal; (3) while Jacques did not say he had some "heavy" business, he did say "I got two business people with me" who are "real business" people and "ah man, if you could see all the [stuff] that Mike and Bang put me in its unbelievable," and arranged for Bones to come to Jacques's home to discuss work; (4) Jacques told Bones on July 30, 1981 that "I was thinking of sending you with [Darryl] down south" and "I don't know what time you guys be leaving, but I would around twelve"; (5) although Jacques did not say he was waiting on a phone call, he did tell Bones that for the moment he had nothing for Bones to do, but that he was "waiting for somebody to be here" so Bones should call back "around supper,"; and (6) Bones's telephone call of August 1 and August 5 interview, when read together, indicate that Jackson had traveled north and Jacques was waiting for him to bring back some money. Not only are there no material misrepresentations, but there is no indication that the minor inaccuracies were intentional or reckless. Thus, the Florida wiretap evidence was not illegally seized under *Franks*.

II.

The Interstate Agreement on Detainers Act ("IAD") provides that if trial is not held within 120 days of the date a prisoner arrives in a receiving state, the charges are to be dismissed with prejudice. 18 U.S.C. Appx. Art. IV(C), V(C). The running of the 120-day limitation, however, may be tolled by the district court "for good cause shown in open court, the prisoner or his counsel being present." *Id.*

The government brought Bubba Jackson to North Carolina for trial from Florida, where he was in custody, by detainer. The 120-day limitation began running on April 13, 1982, the date Jackson arrived in North Carolina. *See United States* v. *Bryant*, 612 F.2d 806, 810-11 n.7 (4th Cir.), *cert. denied*, 446 U.S. 920 (1980). The trial commenced on August 24, 1982, 133 days later. The parties dispute whether the running of the 120-day limitation period was tolled for at least 13 days.

In *United States* v. *Odom*, 674 F.2d 228, 230 (4th Cir.), *cert. denied*, 102 S.Ct. 2946 (1983), this court held that a defendant waives the 120-day limitation by requesting to be treated in a manner inconsistent therewith. The *Odom* court also held that the periods excluded under the Speedy Trial Act, *see* 18 U.S.C. § 3161(h)(1)(F) (*e.g.*, period from filing to disposition of pretrial motion) likewise should be excluded under the IAD. Thus, the government seeks to exclude all days from the filing of pretrial motions to the prompt disposition of those motions, since on April 26 Jackson moved the court to allow him to adopt the motions of his co-defendants. Hearings alone on these pretrial motions took 16 days (May 20-31, June 11-12, June 21-22). Indeed, in rejecting Jackson's motion for dismissal under the IAD, the district court found that Jackson's joining in the motion to suppress the wiretap evidence, without more, amounted to a waiver of the 120-day limitation.

> Of critical importance in the instant situation are defendant Jackson's motion to suppress evidence seized as a result of various electronic surveillances. Had the motion to suppress been allowed, it is doubtful that the government could have proceeded to trial since its case was based

> almost entirely upon this evidence. At least forty-seven days were required by the Magistrate to consider fully and make a recommendation concerning these motions to suppress. Since the trial commenced thirteen days after the running of the 120-day limitation, the 47-day delay caused by defendant Jackson's motions to suppress provides sufficient justification for the denial of defendant Jackson's motion to dismiss based upon the Interstate Agreement on Detainers.

The government also lists several continuances (*i.e.*, requests to be treated inconsistently with the IAD) granted at Jackson's request: (1) at the request of Jackson's attorney, a pretrial hearing was delayed three days from June 7 to June 10; (2) the June 10-12 hearings were continued nine days until June 21 at the request of all attorneys, including Jackson's; (3) at Jackson's attorney's request, defense counsel were given ten days, from June 22 until July 2 to file additional memoranda; and (4) Jackson's attorney, as well as other defense counsel, indicated that the clerk's suggested trial date of July 19 was not satisfactory, and the trial eventually was set for August 16.

Jackson attacks the government's assertion that he sought continuances. He cannot, however, rebut the government's claim that he sought an additional ten days to file memoranda or that he indicated that a July 19 trial date was unsatisfactory. Furthermore, even without considering the continuances, Jackson must be deemed to have waived the 120-day limitation by joining in the co-defendants' motions, especially the motion to suppress the wiretap evidence.

It is not surprising that Jackson was held beyond 120 days given defense counsel's extensive pretrial motions. Jackson joined in those motions, which took a substantial amount of time to resolve, and then surprised the district court by moving for a dismissal under the IAD on the first day of trial. Jackson sought to benefit from the pretrial motions which necessarily resulted in delays, and cannot now claim that he is aggrieved under the IAD by those delays.

III.

Appellants argue that the indictment did not charge possession of a controlled substance listed under 21 U.S.C. § 812 Sched. II, and that the government failed to prove possession of a § 812 Sched. II controlled substance. The arguments are meritless.

The indictments charge a conspiracy to possess with intent to distribute "a schedule II narcotic controlled substance, to-wit: cocaine, in violation of the provisions of 21 United States Code, § 841(a)(1)." Appellants note that possession of some cocaine isomers is legal and conclude that the use of the single word "cocaine" makes the indictment insufficient. The argument ignores the placing of "cocaine" in apposition to the phrase "a schedule II controlled substance." The indictment thus clearly contains a sufficient description of the "controlled substance" element of the offense.

Appellants claim that the government failed to prove that the cocaine here was the illegal kind of cocaine that is a controlled substance under 21 U.S.C. § 812 Sched. II. Appellants point out that the government's expert testified that the seized substance was "cocaine" but that it was not a "narcotic." Since the statutory definitions of the narcotic cocaine and controlled substance cocaine are similar, *see* 21 U.S.C. §§ 802(16), 812 Sched. II.(a)(4), appellants conclude that the evidence was consistent with a conspiracy to distribute the legal kind of cocaine.

The government's expert, however, was unequivocal that the seized cocaine was a controlled substance within the meaning of 21 U.S.C. § 812 Sched. II. Her statement that in chemical terms cocaine is "a stimulant or basic euphoriant," but not a "narcotic" did not affect her conclusion that the seized cocaine was a controlled substance within the meaning of 21 U.S.C. § 812 Sched. II. Furthermore, she stated only that cocaine chemically is not a narcotic, not that cocaine is not a narcotic as defined in 21 U.S.C. § 802(16). Moreover, the offense charged, violation of 21 U.S.C. § 841(a), requires proof of "possess[ion]

with intent to manufacture, distribute, or dispense, a [§ 812 Sched. II] *controlled substance*." Whether cocaine is a narcotic within the meaning of 21 U.S.C. § 802(16) was irrelevant to the determination of guilt or innocence.[3]

IV.

Out-of-court statements by co-conspirators made "during the course of and in furtherance of the conspiracy" are not hearsay and are admissible. Fed. R. Evid. 801(d)(2)(E). Their admissibility turns on "the existence of substantial evidence of the conspiracy other than the statement itself." *United States* v. *Dockins*, 659 F.2d 15, 16 (4th Cir. 1981). Whether such evidence exists is a question for the trial judge. Fed. R. Evid. 104; *United States* v. *Jones*, 542 F.2d 186, 203 n.33 (4th Cir.), *cert. denied*, 426 U.S. 922 (1976).

Appellants, relying on the Fifth Circuit decision in *United States* v. *James*, 590 F.2d 575 (5th Cir.), *cert. denied*, 442 U.S. 917 (1979), argue that it was error for the trial court here not to hold a hearing to determine the existence of the conspiracy *before* any of the co-conspirator statements were admitted in the case-in-chief. This court, however, does not require the *James* hearing. Instead, a trial judge retains the option to admit conditionally the declarations of co-conspirators before the conspiracy has been independently established, subject to the subsequent fulfillment of that factual predicate. *United*

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[3] Thus, the trial court instructed the jury that whether cocaine is a narcotic is

> not material to the guilt or innocence of any of the defendants in the charges as contained in the Bill of Indictment. Therefore, it is not necessary for the government to prove that the substance referred to in the indictment was a narcotic.
>
> I instruct you that cocaine is a Schedule II controlled substance. It is a violation of the laws of the United States for two or more persons to conspire or join together in an agreement to commit an offense in violation of the laws of the United States relating to cocaine.

States v. *McCormick*, 565 F.2d 286, 289 n.5 (4th Cir.), *cert. denied*, 434 U.S. 1021 (1978). The district court safeguards the defendant's rights by being prepared either to declare a mistrial or to dismiss the case if the government fails to prove *aliunde* that a conspiracy existed. Here, that declaration was unwarranted since the existence of a conspiracy was proved by a preponderance of the independent evidence. Indeed, appellants do not challenge the district court's finding that there was sufficient independent evidence of the conspiracy among Coddington, Jackson, and Peed. Rather, they claim a lack of independent evidence that Eleazar, Bumgardner, and Hines were part of that conspiracy. Our review of the evidence, however, indicates otherwise. The recorded conversations of Bumgardner, Hines and Eleazar with Jackson, the go-between of this two-tiered conspiracy, are replete with references by them to their cocaine dealings. *See* Fed. R. Evid. 801(d)(2)(4). Although Eleazar made only two comments during those calls, one comment—"Ronnie got all that stuff"—apparently informed Jackson that a cocaine delivery had been accomplished and she admitted sending money, which other evidence indicated was in payment for drugs, under a false name to Jackson. This independent evidence was sufficient to establish their participation in the two-tier conspiracy.

V.

During the course of the trial, evidence of appellants' bad acts other than the cocaine conspiracy was introduced: (1) Stisser testified that he delivered cocaine to Coddington on a date subsequent to the period of the conspiracy charged; (2) references were made to marijuana dealings before the inception of the cocaine conspiracy; (3) Darryl Provost and Stisser testified that they dealt in quaaludes with Jacques Provost; and (4) Eleazar testified that Jackson was a bond jumper. Appellants argue that they were unfairly prejudiced by the other acts evidence because (1) the consideration of such evidence was not limited to the defendants involved in the acts, thus allowing the government to prove guilt by association,

and (2) the evidence was inadmissible under Fed. R. Evid. 404 as allowing the government to prove guilt by bad character.

While other bad acts evidence is not admissible to show the character of the accused, it is admissible to show motive, intent, absence of mistake, and the like. Fed. R. Evid. 404(b). Thus, the district court here instructed the jury:

> [I]f you, the jury, should find beyond a reasonable doubt, from other evidence in the case, that *the accused* did the acts charged in this indictment, then the jury may consider evidence as to some other act of a similar or like nature, on the part of *the accused*, in determining the state of mind or intent, with which *the accused* did the act which is charged in the indictment. And where proof of an alleged similar act, done at some other time or place, is clear and conclusive, the jury may, but is not obligated to, draw the inference and find that in doing the act charged in this indictment, *the accused* acted wilfully and not because of mistake or accident or other innocent reason. (emphasis added).

Not only did that instruction limit the jury's consideration of the other acts evidence to proof of wilfullness or absence of mistake, but it also limited consideration to the particular accused who performed the other act.

Furthermore, the specific other acts evidence admitted satisfied Rule 404(b) and the probativeness-prejudice balancing requirement of Rule 403. Stisser testified that he delivered cocaine to Coddington in late October, several weeks after the conspiracy alleged in the indictment. Nevertheless, this court has held that "subsequent conduct may be highly probative of prior intent." *United States* v. *Hadaway*, 681 F.2d 214, 217 (4th Cir. 1982). The probativeness is especially great here given the closeness in time—several weeks—of the similar acts.

Although the marijuana conspiracy counts were severed before trial on the grounds that "evidence concerning the marijuana conspiracy may very well be prejudicial to the defendants not charged in those counts," that does not automatically require a finding of unfair prejudice because of the limited

references to marijuana dealings in the cocaine trial. Presumably, if the counts had not been severed, a significantly higher quantity of evidence concerning the marijuana conspiracy would have been introduced, thereby increasing the possibility of prejudice. Here, the limited references to marijuana dealings in order to show intent concerning the cocaine dealings were proper under Rule 404(b). *See United States* v. *Brugman*, 655 F.2d 540, 543-45 (4th Cir. 1981) (evidence concerning marijuana and hashish dealings admissible under Rule 404(b) on charge of cocaine conspiracy). The same reasoning applies to the references to quaalude dealings.

While Eleazar's testimony about Jackson being a bond jumper was not admissible under Rule 404(b), the evidence was elicited by Eleazar's defense counsel, not the government, and immediately struck by the district court as inadmissible hearsay with the instruction to the jury to disregard it. We discern no reversible error in the district court's handling of the inadmissible testimony. *See United States* v. *Johnson*, 610 F.2d 194, 197 (4th Cir.), *cert. denied*, 446 U.S. 911 (1980), ("[a]bsent . . . misconduct on the part of the government counsel, the courts generally have discerned no reversible error where the trial court has acted promptly in sustaining an objection and advising the jury to disregard the testimony).

VI.

The government bears the burden of proving the single conspiracy it charged in the indictment. On appeal, this court must determine whether the evidence, when viewed in the light most favorable to the government, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942), supports the jury's finding of a single conspiracy. If not, reversal is required only where proof of the multiple conspiracies prejudiced the defendants' substantial rights. *United States* v. *Coward*, 630 F.2d 229, 231 (4th Cir.), *cert. denied*, 456 U.S. 946 (1982).

Appellants argue that their convictions were flawed because the government proved ten conspiracies instead of the single conspiracy charged. Appellants view the evidence as showing

a wheel conspiracy with Peed, Coddington, and Jackson at the center and Hines, Eleazar, and Bumgardner as one of the spokes. Since the government did not show that Hines, Bumgardner, and Eleazar knew of the other spokes in the conspiracy, the three could not be considered members of the overall wheel conspiracy. Absent proof of such knowledge, the evidence shows numerous separate conspiracies (*i.e.*, unrelated spokes). We cannot agree.

Viewing the evidence in the light most favorable to the government, a two-tiered conspiracy was shown. The first level included Peed, Coddington, and Jackson and the second included Bumgardner, Hines, and Eleazar. Jackson was the link between the two tiers. The first tier was the wholesaler and the second the retailer. This chain conspiracy is not unlike other multi-level schemes that have been found to constitute a single conspiracy. *See United States* v. *Agueci*, 310 F.2d 817, 826 (2d Cir.), *cert. denied*, 272 U.S. 959 (1963) (chain narcotics distribution conspiracy extends several levels from importation through selling of drugs to user). This would be a different case if the government attempted to charge retailers, *i.e.*, other spokes, other than Bumgardner, Hines, and Eleazar. Here, however, the evidence clearly shows that those three were part of a single retail operation.

The government proved at most two conspiracies, separate wholesale and retail conspiracies.[4] Nevertheless, proof of those two separate conspiracies would not have prejudiced appellants under *Coward* since the jury would not have been confused into imputing guilt to members of one conspiracy because of the illegal activities of the other conspiracy. With only two conspiracies, each at a distinct level, and simple in operation, the jury was not likely to confuse evidence concerning one level as being relevant concerning the other. *Cf. Kot-*

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[4] That view of the evidence requires disregarding the substantial evidence that Jackson linked the two levels.

teakos v. *United States*, 328 U.S. 750 (1946) (proof of separate conspiracies with numerous defendants where conspiracies complex amounts to prejudice).

VII.

Agent Johannesen testified at trial against Jackson. His trial testimony accurately reflected the dollar amount and quantity of a certain transaction involving Jackson. Before the grand jury, Johannesen had overstated the dollar amounts and quantity. In order to impeach Johannesen's testimony, Jackson's attorney sought to introduce the entire written grand jury testimony of Johannesen. When Coddington's counsel objected to the introduction of the entire written testimony on the grounds of irrelevancy, the district court limited Jackson's attorney to introducing the inconsistent statements by having Johannesen read to the jury his prior inconsistent statements. Jackson now argues that the limitation was error and the written transcript should have been submitted to the jury. The argument is frivolous. The district court did not abuse its discretion. The jury was made aware of the prior inconsistent testimony and protected from other irrelevant (and perhaps prejudicial) evidence in Johannesen's grand jury testimony.

VIII.

Eleazar and Hines argue that the evidence is insufficient to support their convictions. Viewing the evidence in the light most favorable to the government, however, the evidence is sufficient to support both convictions.

Most of Jackson's calls were made to Eleazar's telephone in Florida. During one call, Eleazar indicated that a cocaine delivery involving Hines had been accomplished. Later during that conversation, Bumgardner informed Jackson that Eleazar "went by and picked it up," the "it" meaning cocaine." In another conversation, Eleazar told Jackson, "Bumgardner needs to talk to you," whereupon Jackson and Bumgardner proceeded to discuss a cocaine deal. Eleazar also sent money to Jackson, under instructions to use a false name, and evidence

indicated that the money was in payment for drugs. Although Eleazar offered her own version of events, the jury apparently did not accept her story, and viewing the evidence favorably toward the government, her conviction must stand.[5]

Ronald Hines claims a lack of proof as to his identity as a participant in the conspiracy because he was not identified pursuant to Fed. R. Evid. 901(b)(6). That rule allows "[b]y way of illustration only" identification of a telephone caller by evidence that the call was made to a number assigned to him. Hines claims that the proof of his identity was inadequate because "the called party only identified himself as 'Ronnie.' The number . . . is not subscribed to by a Ronnie." Hines also points out that there is no proof that he was at the residence at the time of the call. Nor was the recorded voice identified as his. His argument is completely without merit.

Not only did the conversant identify himself as "Ronnie," but the phone was registered in the name of his parents and Hines was at the house when a DEA investigator visited the house. That evidence is sufficient to establish Hines's identity as the conversant.

IX.

One day during the trial, an FBI agent photographed persons leaving the courthouse and was noticed by juror Denton. Juror Denton advised the court and was informed that the photographs were not being made of jurors, that there was no cause for concern, and that the matter should be disregarded. At a post-trial hearing on the possible prejudicial influence of the picture-taking episode, juror Denton indicated that after receiving the court's assurances, he was not concerned about the photographing and the incident did not affect his delibera-

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[5] The verdict of not guilty on the use of the telephone count is not inconsistent because the jury could have convicted her on the conspiracy count for picking up the drugs, and sending the money, which did not involve her use of the telephones.

tions. Nor was the incident further discussed by him or the other jurors after he conveyed the court's assurances to the other jurors. The district court considered Denton's testimony credible and found that the episode had no prejudicial influence on the jury. That finding is not clearly erroneous. Under *Smith* v. *Phillips*, 455 U.S. 209 (1982), and *Remmer* v. *United States*, 350 U.S. 377 (1956), appellants were entitled to a hearing, which they received, on the possible prejudicial impact of the episode. Absent a showing that the district court's finding of no unfair prejudice was clearly erroneous, we cannot reverse.

X.

For the foregoing reasons, the convictions are

AFFIRMED.

Nos. 83-1138, 83-1155, 83-6086 and 83-6092

In the Supreme Court of the United States

OCTOBER TERM, 1983

GARY J. PEED and JAMES C. CODDINGTON, PETITIONERS

v.

UNITED STATES OF AMERICA

JAMES MAURICE JACKSON, PETITIONER

v.

UNITED STATES OF AMERICA

JEFFREY CRAIG BUMGARDNER, PETITIONER

v.

UNITED STATES OF AMERICA

TERESA ELEAZAR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners were deprived of their right to a fair trial because of a juror's unfounded suspicions about an event outside the courthouse that were dispelled by the district judge during an ex parte inquiry.

2. Whether petitioner Jackson was tried within the time limitation imposed by the Interstate Agreement on Detainers Act, 18 U.S.C. App. § 2, Art. IV(c).

3. Whether telephone calls monitored by state police officers with the consent of a participant were properly admitted in evidence in a federal trial.

4. Whether there was sufficient evidence to support petitioner Eleazar's conviction.

5. Whether Local Rule 19 of the United States Court of Appeals for the Fourth Circuit violates due process.

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (83-1138 Supp. App. 1a-18a) is reported at 717 F.2d 1481.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 1983. A petition for rehearing was denied on November 14, 1983. The petitions for a writ of certiorari were filed as follows: No. 83-1138 on January 11, 1984; No. 83-6086 on January 12, 1984; and Nos. 83-1155 and 83-6092 on January 13, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of North Carolina, all petitioners were convicted on one count of conspiring to possess cocaine with intent to manufacture and distribute, in violation of 21 U.S.C. 846 (Count 1). Except for petitioner Eleazar, each petitioner was also convicted on one of several counts of using a communication facility to facilitate the conspiracy, in violation of 21 U.S.C. 843(b) (Counts 4-7) (83-1138 Supp. App. 3a).[1] Petitioners Peed, Coddington, and Jackson were sentenced to four-year terms of imprisonment on each count, with the sentences on the facilitation counts suspended in favor of a five-year term of probation to run consecutively to the term of imprisonment on the conspiracy count (C.A. App. 288, 291, 292). Petitioner Bumgardner was sentenced to five years' imprisonment on the conspiracy

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[1] Upon petitioners' motions before trial, an additional count (Count 2) charging conspiracy to possess marijuana with intent to distribute was severed.

count, all but six months of which was suspended in favor of five years' probation; his four-year sentence of imprisonment on the facilitation count was suspended in favor of a five-year probationary term, to run concurrently with the sentence on the conspiracy count (C.A. App. 294). Petitioner Eleazar was sentenced to a five-year term of imprisonment on the conspiracy count, all but six months of which was suspended in favor of five years' probation (C.A. App. 290).[2]

1. Testimony presented at trial by cooperating co-conspirators showed the existence of a two-tiered drug conspiracy. The first tier was centered in Apex, North Carolina, under the supervision of James "Jacques" Provost. Jacques' two investors or partners were petitioner Peed in Virginia and petitioner Coddington in Florida. The first tier employed three drug couriers, one of whom was petitioner Jackson, who shuttled drugs and drug cutting agents between the first tier and the second, smaller tier in Jacksonville, Florida. Petitioners Bumgardner and Eleazar (who was Jackson's sister and Bumgardner's girlfriend) were part of the second tier. 83-1138 Supp. App. 3a.

The testimony of the cooperating co-conspirators was amplified by the playing of numerous recorded

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[2] Ronald Doyle Hines, a co-defendant whose convictions on one count each of conspiracy and using a communication facility to facilitate that conspiracy were also affirmed by the court of appeals, was sentenced to the same sentence petitioner Bumgardner received (83-1138 Supp. App. 3a; C.A. App. 289). Of the four additional people indicted with petitioners, three (Donald Christopher Provost, Darryl Stephen Provost and Peter David Stisser) pleaded guilty prior to trial, and the charges against the fourth (Tina Pitts Provost) were dismissed on the government's motion. Darryl Provost and Peter Stisser testified for the government at trial.

telephone conversations among the conspirators. In these conversations, petitioner Peed discussed the quality, quantity, and types of cocaine by the use of coded terms (12 R. 178-186)[3] as well as the planned delivery to him of cocaine by Darryl Provost (12 R. 75-79). In another conversation, petitioner Coddington discussed with Jacques Provost cocaine quality, delivery dates, and quantity (12 R. 159-169); the next day, after Darryl Provost had been arrested with cocaine in Virginia, they discussed the arrest, the sale of land to raise funds for cocaine, and the amount of money needed to pay for the cocaine confiscated in Virginia (13 R. 81-92). Petitioner Jackson was recorded requesting Darryl Provost to bring him tools for treating cocaine (12 R. 104-105) and discussing the pickup of proceeds from cocaine sales (14 R. 147-148, 171-174, 188-194).

The participation of petitioners Bumgardner and Eleazar in the drug scheme was similarly evidenced by their recorded conversations. In a conversation with Jackson, petitioner Bumgardner discussed drug transactions using coded terms (14 R. 245-249). Later, after discussing "the weights and everything" (*ibid.*), Jackson determined from Bumgardner that certain scales were "triple beam" and told Bumgardner to "take that thing and make four of them out of it" (15 R. 10-11). The next day Jackson asked Bumgardner whether or not "they look like they're weighed out right," and Bumgardner indicated that he did only "2 G's at a time" (15 R. 74-75).

Petitioner Eleazar's boyfriend (Bumgardner) and brother (Jackson) used her telephone to carry out drug transactions (11 R. 137-138). During at least one conversation, she listened on an extension phone

[3] "R." refers to the record on appeal.

and twice interjected comments in the conversation (15 R. 108-109). During one call, she told Jackson that "Ronnie got all that stuff" (14 R. 91), and later in the same call Bumgardner told Jackson that "Teresa [Eleazar] went by and picked it up" (14 R. 92-93). During another call, petitioner Jackson directed co-defendant Hines to give money to Bumgardner, "because I'm gonna get them to wire me the money" (15 R. 80, 81). Three days later, Jackson instructed his sister how to wire money to Jacques Provost in North Carolina and told her "if you got to leave a name, just give some, you know, anonymous name, you know" (15 R. 102).

2. After the verdicts were returned, petitioners learned that during trial one of the jurors had become concerned by a courthouse incident and had reported the matter to the district judge, who, after investigation, had reported back to the juror (83-1138 Pet. App. 13a-16a). At the request of counsel (*id.* at 11a), the district court conducted a hearing on September 30, 1982, attended by all petitioners (except Bumgardner, who had been arrested on other charges the night before) and their counsel (9/30/82 Tr. 5). The testimony at that hearing showed that, during trial, an FBI agent investigating another matter attempted to photograph some of the defense witnesses as they left the courthouse at the end of the day (83-1138 Supp. App. 17a; 83-1138 Pet. App. 20a, 25a-26a). To focus his camera, he aimed it at several people, including some jurors, as they left the courthouse (83-1138 Pet. App. 26a).

One of the jurors, Bryant Deaton,[4] observed the photography, noted the license number of the pho-

[4] Juror Deaton's name was misspelled "Denton" by the court of appeals (83-1138 Supp. App. 17a).

tographer's car, and returned to the courthouse to report the incident (83-1138 Pet. App. 19a-20a, 30a). The judge called Deaton into chambers, where Deaton reported the incident in the presence of the judge's clerk and gave the judge the piece of paper with the license plate number (*id.* at 20a, 30a-31a, 35a). After the juror's departure, the district judge called the FBI, described the events, and gave the agents the license number provided by Deaton (*id.* at 20a, 24a-25a). The investigating agent determined that another agent was responsible for the photography and reported that fact to the district judge early the following morning (*id.* at 25a-26a).

When juror Deaton arrived in the jury room the following morning, he expressed his concern about the incident to the foreman (9/30/82 Tr. 105). The district judge then called Deaton to his chambers to notify him of the result of his investigation. The district judge told Deaton that he had determined who had been taking the photographs; that the photography had not been aimed at the jurors and that Deaton should not consider it to have been directed at him or at any other juror; and that the judge would prefer not to describe the background of the incident in detail at that time but would do so at the end of trial (83-1138 Pet. App. 20a, 31a). When juror Deaton returned to the jury room, he recounted the incident to the other jurors and reported that the judge "had assured [him] that everything was okay" (*id.* at 32a, 36a). The incident was not discussed or mentioned again among the jurors during trial or deliberations (*id.* at 32a, 34a, 36a).

Juror Deaton testified that when he initially saw the photographer he was apprehensive, thinking that someone might be photographing the jurors in order to retaliate if they returned a guilty verdict (83-1138

Pet. App. 36a, 40a). After talking to the district judge the following morning, however, "[i]t was no longer a concern for me * * *. I didn't think anymore about it" (*id.* at 34a). Juror Deaton affirmed that the incident did not have "any effect whatsover on [his] verdict" (*ibid.*). Nor, in his opinion, did the incident have any impact on the deliberations of the jury (*id.* at 32a-33a). As Deaton explained, he assumed "after the judge had said that everything was okay that it was something to do with either the SBI or the FBI or some law enforcement agency" (*id.* at 42a). It was to satisfy his curiosity about the incident and the accuracy of his assumption that he asked the judge from the jury box for more details about the photography incident after the jury had rendered its verdict (*id.* at 13a, 34a).

At the conclusion of the hearing, the district court issued written findings and concluded that the deliberations of neither juror Deaton nor other members of the jury had been prejudiced as a result of the incident (C.A. App. 297-299).

3. On appeal, petitioners raised many of the same issues presented here. The court of appeals rejected their challenges and affirmed the convictions. In particular, it held that (1) the federal wiretap evidence was not tainted by allegedly illegal consensual monitoring of phone calls by state police officers (83-1138 Supp. App. 4a-6a); (2) petitioner Jackson, after excluding the time consumed by resolution of his pretrial motions and his request for continuances, was tried within the 120-day limit of the Interstate Agreement on Detainers Act (IAD), 18 U.S.C. App. § 2, Art. IV (83-1138 Supp. App. 8a-9a); (3) there was a preponderance of evidence independent of the co-conspirator statements to show that petitioners Bumgardner and Eleazar were members of the con-

spiracy (*id.* at 11a-12a); (4) the evidence of petitioner Eleazar's participation in the conspiracy was sufficient to support her conviction (*id.* at 16a-17a); and (5) petitioners had received the hearing to which they were entitled regarding the possible prejudicial impact of the photography incident, and the district court's finding that the episode had not prejudiced petitioners was not clearly erroneous (*id.* at 17a-18a).

ARGUMENT

1. All petitioners except Jackson contend (83-1138 Pet. 8-29; 83-6086 Pet. 5-8; 83-6092 Pet. 16-22) that the photography incident deprived them of their right to an impartial jury. They also argue that the district judge's ex parte contact with juror Deaton deprived them of various constitutional and statutory rights, and that the district court's post-trial hearing inadequately resolved those claims.[5] We submit that, regardless of petitioners' claims of constitutional injury, they have failed altogether to show any harm flowing from the incident. *Rushen* v. *Spain*, No. 82-2083 (Dec. 12, 1983).[6]

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[5] We note that, in the court of appeals, petitioners assessed the merits of this issue to be so low as to accord it less than one page in their brief (C.A. Br. 71-72). That bare statement of the claim was amplified in their reply brief (C.A. Reply Br. 18-28), to which the government, of course, had no opportunity to respond.

[6] The essence of petitioners' various constitutional claims is that they had a due process right to a mid-trial hearing regarding the trial court's contact with juror Deaton. There was, however, a post-trial hearing on the issue that was attended by all petitioners (except Bumgardner, who had been arrested the night before) and their counsel, and all counsel participated in the cross-examination of the witnesses. Even if it would have been preferable for the court to notify counsel

a. Petitioners have failed, as the district court concluded (C.A. App. 299), to carry their initial burden of showing a deprivation of a right so essential to the integrity of the trial that it renders void their presumptively valid convictions. Petitioners were unable to show that juror Deaton's experience interfered, directly or indirectly, with the jury's deliberations.[7] Deaton's overnight suspicion of foul

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promptly of his exchange with Deaton—when, for example, alternate jurors could have been used if he were found to be prejudiced—the omission is not fundamental here, where Deaton was found not to be prejudiced. Indeed, because petitioners do not claim any prejudice from the judge's ex parte contacts themselves, but only from the juror's misapprehension about the photography incident, it is difficult to see why the post-trial hearing was not an adequate forum to inquire into the incident. See *Rushen* v. *Spain*, slip op. 5 n.5 (Stevens, J., concurring).

The complaint of petitioners Peed and Coddington (83-1138 Pet. 23-24) that they were not given prior notice that the September 30 sentencing hearing would also be a hearing into the photography incident is unavailing. They argue that, because of the lack of notice, they were unable to prepare for the hearing by collecting factual information. The simple answer to this contention is that, had the judge convened a mid-trial hearing as petitioners seem to prefer, they would have had no greater opportunity to prepare.

[7] The district court's factual findings regarding its ex parte communications with Deaton and their effect on juror impartiality are entitled to a presumption of correctness. See *Rushen* v. *Spain*, slip op. 6. Cf. *Rogers* v. *United States*, 422 U.S. 35, 40-41 (1975) (Court concludes that ex parte contact by judge with deliberating jurors is not harmless error because of "the nature of the information conveyed to the jury" and the "manner in which it was conveyed"; error was compounded by the fact that the trial court did not hold any hearing into the effect of its communication with the jurors and "petitioner's counsel was not aware of the court's communication until after * * * the petition for certiorari" was granted).

play was based on his erroneous inference from FBI conduct wholly unrelated to him. As Deaton testified, and as the district court found (C.A. App. 298-299), the court's assurance that the photography had nothing to do with him or anyone else on the jury completely alleviated Deaton's concern and the incident had no effect on his deliberations or decision as a juror. Like the juror in *Spain*, Deaton "turned to the most natural source of information—the trial judge" —to report his observations (*Rushen* v. *Spain*, slip op. 7). And, as in *Spain*, the district judge "did not discuss [with the juror] any fact in controversy or any law applicable to the case" (*ibid.*). The conclusion that Deaton was not biased by the photograph incident or his contact with the judge is amply supported by the record.[8]

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[8] Petitioner Eleazar argues (83-6092 Pet. 21) that the trial court's failure to give juror Deaton a complete explanation of the FBI's activities inevitably contributed to bias and that this Court disapproved of such a partial communication in *Remmer* v. *United States*, 350 U.S. 377, 379 (1956). This argument overlooks a critical difference in the facts of the two cases. In *Remmer*, the juror had been approached by a third party who suggested he make a deal with the defendant. Thereafter, the juror approached the trial court, who contacted the FBI, who in turn interviewed the juror (350 U.S. at 380-381). The juror, however, was never informed of the outcome of the FBI investigation (*id.* at 382). This Court remanded the case for a new trial because this course of events left the juror "a disturbed and troubled man * * * subjected to extraneous influences to which no juror should be subjected" (*id.* at 381-382). The facts of this case hardly parallel *Remmer*. Whatever Deaton initially feared, he knew he had no role in and could not be suspected of any wrongdoing. And once he was assured that the incident did not concern him or the other jurors in any way, the possibility of bias was removed.

Nor did petitioners sustain their burden of showing that the other jurors were prejudiced or influenced by the incident. If any of the other jurors saw the original photography, none of them brought it to the attention of the judge. Juror Deaton returned alone to the courthouse to report his concerns. The next morning, before talking to the district judge, Deaton discussed the matter only with the jury foreman (9/30/82 Tr. 105). Not until he returned from the judge's chambers did he tell the other jurors about the incident, and at that point he also conveyed the judge's assurance that it did not concern any of them in any way (83-1138 Pet. App. 32a, 34a, 36a). Thus, none of the other jurors experienced any period of doubt before the matter was resolved.

b. Petitioners contend (83-1138 Pet. 22-29; 83-6086 Pet. 7-8; 83-6092 Pet. 16-22) that the post-trial hearing into the photography incident was defective and did not comport with the requirements of *Remmer* v. *United States*, 347 U.S. 227, 230 (1954). In particular, they argue that the district court erroneously imposed the burden of proof on them rather than on the government and that the district judge's failure to call all the other jurors deprived petitioners of the opportunity to test the impartiality of the whole jury.[9]

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[9] Petitioners also assert (83-1138 Pet. 24-25) that the need for the district judge to relate the circumstances of the ex parte contact required him to recuse himself, because only in that way could he be properly cross-examined. But, while a judge does not properly act as a witness in a trial at which he presides, that principle does not bar him from relating the historical facts surrounding his mid-trial communication with a juror. Because there "is scarcely a lengthy trial in which one or more jurors does not have occasion to speak to the trial judge about something" (*Rushen* v. *Spain*, slip op. 4), forbid-

i. Petitioners' argument that they were required improperly to bear the burden of proof misapprehends *Spain*, *Remmer*, and *Smith* v. *Phillips*, 455 U.S. 209 (1982). A defendant claiming juror impartiality is entitled to a hearing in which he "has the opportunity to prove actual bias." *Phillips*, 455 U.S. at 215; *Rushen* v. *Spain*, slip op. 5 n.3. Some circumstances, however, justify a presumption of bias or prejudice.[10] But the burden shifts to the government to show beyond a reasonable doubt that the error was harmless only after the defendant has established actual or presumptive prejudice. *Remmer*, 347 U.S. at 229.

The facts in this case do not meet the standards for presumptive prejudice as defined by this Court, nor have petitioners shown actual prejudice. This case does not resemble *Remmer*'s attempted bribery of a juror by a third party. Indeed, it involves no third-party contact at all. Just as importantly, the photography incident did not involve a matter pending before the jury. And, no extraneous outside pressures were brought to bear on Deaton or other mem-

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ding a judge to relate these details unless he is called as a witness before another jurist would ignore the "day-to-day realities of courtroom life" (*ibid.*). In any event, every fact related by the judge in this case was corroborated by the FBI agent and juror Deaton, both of whom were extensively cross-examined. Moreover, none of the trial attorneys showed the least reluctance to speak candidly to the judge about his actions (9/30/82 Tr. 174).

[10] In *Remmer*, where a third party had suggested to a juror that he could profit financially by making a deal with the defendant, the court held that "any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is * * * presumptively prejudicial" (347 U.S. at 229).

bers of the jury.[11] Because the facts of this case cannot be considered to raise a presumption of bias on the part of Deaton or other members of the jury, petitioners bore the burden of making an initial showing of actual prejudice; as demonstrated above, they failed to shoulder it.

ii. At the conclusion of the examination of the witnesses at the post-trial hearing, defense counsel requested the district judge to call the other jurors to ascertain the impact of the incident on them (9/30/82 Tr. 169-170). Contrary to petitioners' contention, the district court did not deny their request outright. He instead reserved the decision whether to call additional witnesses until after argument from counsel (*id.* at 171). The thrust of counsel's argument to the district court was that a post-trial hearing skews the resolution of the prejudice issue (*id.* at 174), that the government had engineered the photography incident (*id.* at 176, 179, 182, 184), that the whole affair was highly prejudicial and unfair (*id.* at 175, 177, 179-180, 185-186), and that the government had failed to carry its burden (*id.* at 173, 175). Only the lawyer of the one petitioner who does not present the question to this Court (see 83-1155 Pet. at i) suggested the need to call the other jurors, and even his asserted need for those witnesses was diminished by his claim that, at the outset, prejudice is presumed in a case like this (9/30/82 Tr. 174-175). No other counsel at the hearing

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[11] The only "outside influence" on Deaton was created by the juror himself when he misinterpreted the photography incident. The issue at the post-trial hearing was not whether Deaton had been biased by the photography, but whether he harbored any ill will toward petitioners after he received the judge's assurance that the incident had nothing to do with him or the jury.

or following issuance of the court's final order pressed the need to examine the other 13 jurors. The district court's ruling on this issue, therefore, warrants no futher attention by this Court.

In any event, the district court explained its decision not to call additional witnesses. It found Deaton to be a highly credible witness. Referring to Deaton's assertion that the incident was not discussed during the trial or the jury's deliberations, the court found it "inconceivable * * * that any of the other jurors, not directly involved in the incident, could have been prejudiced or influenced in any way" (C.A. App. 299). In these circumstances, the trial court acted well within its discretion in refusing further probing of the jury.

2. Petitioner Jackson contends (83-1155 Pet. 10-23) that the court of appeals erred in concluding that he waived the 120-day limitation of the Interstate Agreement on Detainers Act (IAD), 18 U.S.C. App. § 2, Art. IV(c), when he requested that he be treated in a manner inconsistent with that time limitation by seeking continuances and joining with the other petitioners in several pretrial motions. He cites no authority to the contrary, however, and his position is not supported by reason or the legislative history of the Act.

The government brought petitioner to North Carolina for trial from Florida, where he was in custody, by detainer. He arrived in North Carolina on April 13, 1982, and trial commenced 133 days later, on August 24, 1982. On April 26, 1982, petitioner moved the district court to allow him to adopt the motions of his co-defendants, the hearings on which consumed 16 days (83-1138 Supp. App. 8a). In addition, peti-

tioner requested singly, or joined in the motions of co-defendants for, continuances which consumed another 50 days (*id.* at 9a). In this Court, as below, petitioner contests the assertion that he sought these continuances (83-1155 Pet. 14). But, as the court of appeals noted, exclusion of the 16-day period required to resolve the pre-trial motions would by itself bring petitioner's trial well within the 120-day limitation period (83-1138 Supp. App. 9a).[12]

Petitioner argues (83-1155 Pet. 19-21) that the court of appeals' analogy to the Speedy Trial Act of 1974, 18 U.S.C. 3161(h), is inconsistent with congressional intent. This claim is, however, refuted by the legislative history of the IAD. The IAD was a legislative response to the Court's ruling in *Dickey* v. *Florida*, 398 U.S. 30 (1970), which held that a state must make a diligent, good faith effort to try a defendant within a reasonable time even when he is serving a sentence in a federal prison outside the state. The

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[12] On facts closely analogous to those of the present case, the Second Circuit recently rejected a claim under the IAD identical to the one presented by petitioner in this Court. *United States* v. *Scheer*, No. 83-1308 (2d Cir. Feb. 24, 1984). In that case, the court of appeals noted that "[t]he defendant asked for additional time to procure an attorney, to suppress evidence and to procure a state transcript. He requested continuances based on the unavailability of his witnesses and moved that the court allow these witnesses to be subpoenaed" (slip op. 2001). Finding that "it is appropriate to exclude all those periods of delay occasioned by the defendant" (slip op. 2000) which in that case amounted to 148 days, the court of appeals concluded that the defendant's rights under the IAD were not violated (*id.* at 2001-2002) (citing cases). Although the defendant had awaited trial a total of 249 days, after deducting the 148 days of delay "that defendant requested * * * solely for his benefit," the court found that he was "brought to trial within the statutory [120-day] time period" (slip op. 2000).

IAD was enacted principally to "afford defendants in criminal cases the right to a speedy trial and diminish the possibility of convictions being vacated or reversed because of a denial of this right." S. Rep. 91-1356, 91st Cong., 2d Sess. 2 (1970). Because the IAD and the Speedy Trial Act of 1974 are both intended to insure speedy trials, they should not be interpreted in a discordant manner. *United States* v. *Odom*, 674 F.2d 228, 231 (4th Cir.), cert. denied, 457 U.S. 1125 (1982). See also *United States* v. *Stewart*, 311 U.S. 60, 64-65 (1940) (statutes having same purpose should be construed together). The court of appeals, therefore, properly concluded that any period lawfully excluded under 18 U.S.C. 3161(h) will generally qualify for exclusion under the "good cause" provision of IAD § 2, Art. IV(c) (83-1138 Supp. App. 8a; *Odom*, 674 F.2d at 231).

Petitioner's further argument that the time provisions of the IAD must be explicitly waived in open court [13] and cannot be waived by his own actions is not supported by the cases on which he relies [14] and

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[13] Petitioner's suggestion (83-1155 Pet. 17) that any waiver here does not comply with the "in open court" provision of the IAD because his motions for continuances and other relief were written is an overly literal interpretation of the Act. The language in the IAD relied upon by petitioner was meant to prohibit ex parte and sua sponte continuances; it was not designed to require the personal presence of the parties to discuss the excludability of time. *Odom*, 674 F.2d at 231.

[14] Petitioner's reliance on *United States* v. *Mauro*, 436 U.S. 340 (1978), is misplaced. In a companion case to *Mauro*, this Court dismissed charges that were not tried within the 120-day limitation of the IAD, but the defendant in that case, unlike petitioner, had made repeated requests for a speedy trial, had taken no action that would delay trial, and had objected to other efforts to continue or delay trial. 436 U.S. at 346-347, 364-365.

is contrary to common sense. Without citing any authority, petitioner claims (83-1155 Pet. 17-19) that his own acts that are inconsistent with the IAD protection of his speedy trial rights cannot be construed as an implicit waiver of the IAD time limitation. But petitioner's argument, taken to its logical conclusion, would give a defendant the power to delay his trial past the 120-day limitation period with pretrial motions and requests for continuances, and then demand dismissal of all charges because of that delay. Such a result is clearly inconsistent with the legislative objective of "diminish[ing] the possibility of convictions being vacated or reversed because of a denial of [a speedy trial]." S. Rep. 91-1356, *supra*, at 2. If petitioner objected to the delay of his trial, he should, like the defendant in *United States* v. *Mauro*, 436 U.S. 340 (1978), have interposed an explicit objection on speedy trial grounds so that the trial court could consider it. *Odom*, 674 F.2d at 231-232.

3. Petitioner Eleazar contends (83-6092 Pet. 14-15) that evidence seized in the federal wiretap should have been excluded because that wiretap was instituted on the basis of information gained from the improper monitoring of telephone calls by state officers. Petitioner's argument founders, however, on both state and federal law.

First, as the court of appeals noted, while a municipal police officer in Florida has limited authority to conduct an investigation outside city limits (*Wilson* v. *Florida*, 403 So.2d 982, 984 (Fla. 1980)), such an investigation is within the officer's authority if the crime under investigation took place within the city limits (83-1138 Supp. App. 5a). In this case, Jacksonville Beach police officers monitored calls made by their informant to Jacques Provost's home

outside city limits. However, because the officers were investigating a double murder that occurred in Jacksonville Beach, which Jacques Provost was suspected of having ordered, the consensual monitoring of the telephone calls was legal under state law (83-1138 Supp. App. 5a).

Second, whether evidence is admissible in a federal court is a question of federal law. See, *e.g.*, *Elkins* v. *United States*, 364 U.S. 206, 223-224 (1960); *United States* v. *Zemek*, 634 F.2d 1159, 1164 n.4 (9th Cir. 1980), cert. denied, 450 U.S. 985 (1981); Fed. R. Evid. 402. Federal law clearly permits the admission of consensual wiretap evidence irrespective of whether it conforms to state wiretap standards. See, *e.g.*, *United States* v. *Adams*, 694 F.2d 200, 201 (9th Cir. 1982), cert. denied, No. 82-1427 (June 13, 1983); *United States* v. *Neville*, 516 F.2d 1302, 1309 (8th Cir. 1975). Because the monitoring of the telephone calls at issue would have been legal under federal law (18 U.S.C. 2511(2)(c)), admission of the wiretap evidence in a federal trial was wholly uncontroversial.

4. Petitioner Eleazar also argues (83-6092 Pet. 15-16) that the evidence supporting her conviction was insufficient.[15] Both courts below have rejected this fact-bound claim and the question does not warrant further consideration by this Court. See *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2

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[15] Petitioner also asserts (83-6092 Pet. 12-13) that there was insufficient evidence independent of her co-conspirators' statements showing the existence of the conspiracy and her participation in it. This fact-bound contention is without merit. There was ample independent evidence showing petitioner Eleazar's participation in the conspiracy—largely derived from recordings of petitioner herself. See n.16, *infra*.

(1975); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).[16]

5. Finally, petitioners Bumgardner and Eleazar complain that the court of appeals' Local Rule 19, which requires the filing of one brief for each side in a consolidated case, violates due process (83-6086 Pet. 4; 83-6092 Pet. 9).[17] We have substantial reservations about the wisdom of this rule, but it does not

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[16] In any event, the record in this case amply supports petitioner Eleazar's conviction. See 83-1138 Supp. App. 16a-17a. For example, in one telephone call petitioner told Bubba Jackson that "Ronnie got all that stuff" (*id.* at 12a, 16a). Later in the same call, Bumgardner informed Jackson that "Teresa [petitioner] went by and picked it up," where "it" referred to cocaine (*ibid.*). During another call, Jackson told Hines to give money from a drug sale to Bumgardner because Bumgardner and petitioner would be wiring money to him. Three days later, Jackson instructed petitioner how to wire money under an assumed name. Although petitioner testified at trial and offered her own version of these events, the jury apparently did not accept her story (*id.* at 17a).

[17] Rule 19 of the Rules of the United States Court of Appeals for the Fourth Circuit provides:

> Related appeals or petitions for review will be consolidated in the Office of the Clerk, with notice to all parties, at the time a briefing schedule is established. One brief shall be permitted per side, including parties permitted to intervene, in all cases consolidated by court order, unless leave to the contrary is granted upon good cause shown. In consolidated cases lead counsel shall be selected by the attorneys on each side and that person's identity made known in writing to the Clerk within seven (7) days of the date of the order of consolidation. In the absence of an agreement by counsel, the Clerk shall designate lead counsel. The individuals so designated shall be responsible for the coordination, preparation and filing of the brief and appendix.

follow that it is unconstitutional or that its application in this case merits review by this Court.

The courts of appeals are authorized to regulate their practice "in any manner not inconsistent with [the Federal Rules of Appellate Procedure]" (Fed. R. App. P. 47), and the court of appeals' rule is not inconsistent with any provision of the rules.[18] The rule is not calculated to preclude the presentation of issues or arguments by individual appellants, but rather to encourage such litigants to keep their appellate pleadings within manageable limits. The record in this case, moreover, demonstrates that the rule did not in fact preclude the petitioners from presenting their various arguments before the court of appeals.

Following entry of the lower court's order consolidating the appeals in this case, all counsel for the various petitioners joined in a motion to enlarge the length of the brief from 50 to 75 pages. That motion was granted by the court. Counsel apparently encountered some difficulty in compiling the consolidated brief, however, and two briefs were in fact submitted to the court of appeals, a 72-page brief and a 128-page brief. The latter, according to counsel, "consist[ed] of the good faith presentation of issues by officers of this court as if they were representing their clients without the inhibitions of * * * Local Rule 19" (Second Motion to Enlarge Length of Brief at 4). The court was not informed at this time that the shorter brief omitted any important arguments

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[18] Rule 28(i) of the Federal Rules of Appellate Procedure provides that, in cases involving multiple appellants or appellees, "any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs."

on behalf of individual petitioners, and the motion to file the 128-page brief was denied.

Thereafter, several reconsideration motions were filed with the court of appeals. These motions, for the first time, suggested that the 72-page brief did not contain certain arguments various petitioners desired to present to the appellate court. See Appellant Gary J. Peed's Motion for Reconsideration at 3-4; Appellant Jeffrey Craig Bumgardner's Motion for Reconsideration at 3-4; Appellant James C. Coddington's Motion for Reconsideration at 3-4. Apart from citing the general "difficulty of filing a joint brief with six parties' interests being represented," [19] however, the motions gave no reasons why the court should further extend its 75-page limitation on the consolidated brief. In particular, although the various motions alleged that counsel for petitioners were "unaware" that certain arguments had been deleted from the shortened brief (Reconsideration Motions for Peed, Bumgardner and Coddington at 4), the papers filed with the court did not explain why counsel were not cognizant of the contents of a brief supposedly prepared under their direction. Moreover, the various motions did not explain why petitioners did not utilize the three remaining pages of briefing left to them under the court's prior order to bring at least some of the "omitted" issues to the court's attention. Accordingly, the court denied the reconsideration motions.

Thus, the course of events in this case does not show that the operation of Local Rule 19 denied petitioners any due process right to present their arguments. Petitioners never availed themselves of their

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[19] Motion for Reconsideration at 3 filed by lead counsel for the appellants.

right under Rule 19 to seek permission to file separate briefs upon a showing of "good cause," nor did they explain in timely fashion what specific prejudice would be incurred by filing within the 75-page limit sought and granted in their initial motion. Rather, petitioners simply refused to present their omitted arguments to the court of appeals on any but their own terms. In these circumstances, their complaint regarding the local rule does not merit review by this Court.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1984

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 421023 557

No. 83-1138

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GARY J. PEED

and

JAMES C. CODDINGTON,

Petitioners,

v.

UNITED STATES OF AMERICA

Respondents.

PETITIONERS' REPLY TO OPPOSITION

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QUESTIONS PRESENTED

I. Are mid-trial chambers conferences between a juror and a trial judge, regarding the juror's apprehension for his safety caused by third party contact with the jury critical stages of the trial, and the intentional exclusion of the Petitioners and Petitioners' counsel from such proceedings a violation of the Petitioners' right to be present under Fed. R. Crim. P. 43(a) and their Sixth Amendment right to counsel?

II. Is the Burden on the Government to prove violations of Petitioners' right to be present and right to counsel during mid-trial *ex parte* juror-judge substantive communications harmless beyond a reasonable doubt pursuant to *Remmer* v. *United States*, *Smith* v. *Phillips* and *Rushen* v. *Spain*?

III. Can a due process post-trial hearing authorized in *Remmer* v. *United States* and *Smith* v. *Phillips* be conducted without adequate notice, without an impartial fact finder and without the right to summon material witnesses and evidence?

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STATEMENT OF THE CASE OMITTED BY GOVERNMENT

There were three extraneous contacts with jurors during the course of Petitioners' and co-defendants' trial.

During their case in chief, as the jury was exiting the courthouse after the sixth day of Petitioners and four co-defendants' trial, at least five jurors (9/30 TR 102 Ap. 41a, 122, Ap. 44A) saw an unidentified individual seated in a parked automobile across from the courthouse aiming a camera equipped with a 12''-15'' telephoto lens at them (9/30 TR 116 Ap. 43a).

Juror Bryant Deaton later testified that because of the nature of the trial, he and the other jurors were "scared," feared for their personal safety and believed the defendants were having pictures taken of the jury (9/30 TR 95, App. 37a-38a, 99, App, 38a-39a; 100 App. 39a-40a; 101, App. 40a).

Juror Deaton testified on cross-examination that given the nature of the case he was concerned that there might be some reason that someone would like to know something about the jurors or have pictures of them. He testified he was scared and concerned for his personal welfare (9/30 TR 93, App. 36a-37a).

Juror Deaton further testified he thought some of the other jurors were also concerned (9/30 TR 95, Ap. 38a). He testified that every member of the jury panel was aware of the fact that he (Deaton) and others had been photographed as they were leaving the courthouse, and knew he (Deaton) had taken down the license plate number of the car and reported it to the judge (9/30 TR 99, App. 38a-39a). Notwithstanding the trial judge's personal assurances, Juror Deaton could not testify whether the other jurors were as assured as he was (9/30 TR 100, App. 39a).

Further cross-examination of Juror Deaton indicated that he (Deaton) believed the perpetrator(s) of the photographing incident to be the Petitioners and co-defendants (9/30 TR 100, 101, App. 40a).

Juror Deaton testified that his fear abided with him overnight (9/30 TR 100, 101, App. 40a). He testified that from September 1, 1982, the date of the incident, until September 30, 1982, the date of the post-trial hearing, he (Juror Deaton) believed the photographing incident had something to do with the case; the trial judge never informed Juror Deaton otherwise (9/30 TR 106, 107, App. 42a).

ARGUMENT

The Government's response to Peed's and Coddington's Petition for Certiorari illustrates the present confusion and immediate need for this Court to clarify the

separate but interrelated constitutional rights of the Petitioners: (1) to be present at critical stages of trial; (2) to be represented by counsel at critical stages of trial; (3) to a trial by an impartial jury; and (4) to a full and adequate post-trial hearing on jury bias.

The Government incorrectly characterizes "the essence" of Petitioners' claims as a plea for recognition of a due process right to a mid-trial hearing. (Brief in Opposition, n. 6) Petitioners Peed and Coddington make no such claim. The *true* "essence" of Petitioners' claim is that once the trial judge elected to engage in mid-trial communications with a juror, such communications were a critical stage of the proceedings at which petitioners were entitled to be present and represented by counsel.

This Court referred to such rights as "fundamental" in *Rushen* v. *Spain*, 464 U.S. ____, (Slip op. Dec. 12, 1983) Petitioners ask for clarification of the issue left unresolved in *Rushen*, to-wit; whether such fundamental rights are of a constitutional dimension. Nowhere in the Brief in Opposition does the Government address the Petitioners' right to be present or the right to counsel during two separate substantive communications between judge and juror.

The Government incorrectly states that "the district court's factual findings regarding its *ex parte* communications with Juror Deaton and their effect on juror impartiality are entitled to a presumption of correctness." (Brief in Opposition, n. 7) *No* factual findings were made regarding the trial judge's *ex parte* communications with the juror, hence no presumption of correctness can be afforded the District Court's factual findings. The *only* issue addressed by the District Court at the post-trial hearing was whether the photographing incident affected Juror Deaton. The trial judge did not address the Peti-

tioners' right to be present, to be represented by counsel, and participate during the *ex parte* communications and instructions between judge and juror. (83-1138 Pet. 15-21)

An illustration of the necessity of the right to counsel and the need to participate during instructions to, and communications with, the jury during trial is the inaccurate description of the trial judge's and Juror Deaton's versions of their *ex parte* communications (Brief in Opposition, at 6). At first blush one would think both the judge and the juror remembered the communication similarly, but when more closely analyzed one realizes that Juror Deaton simply does not recall the judge saying that the photography had *not* been aimed at the jurors and that Juror Deaton should not consider it to have been directed at him or any other juror (contrast 83-1138 Pet. App. 20a with 31a and 42a). Petitioners contend that the correct constitutional procedure was established in *United States* v. *Ronder*, 639 F.2d 931 (2d Cir. 1981) where the Second Circuit identified four necessary components for the proper disposition of any communication between judge and jury.

Should this Court determine that Petitioners were denied their constitutional right to be present and represented by counsel, *the Government must prove* such violations to be harmless beyond a reasonable doubt. *Rushen* v. *Spain*, *id.* There has been no lower court determination that the government ever carried this burden, thus there are no "factual findings" that can be presumed to be correct.

The situation in this case is similar to *Rogers* v. *United States*, 422 U.S. 35, 40-41 (1975) in that the trial court did not hold any hearing on the effect of *its* intended communications with the jurors.

If deference is to be given to the factual findings below, the Government misstates the facts surrounding the other jurors' awareness of the photographing incident. The Government questions "if any of the other jurors saw the original photograph(ing)," (Brief in Opposition, at 11). The record clearly establishes that at least five jurors actually witnessed a camera being pointed at them and believed as Juror Deaton that their picture was being taken. (9/30 TR 102, 122, App. 41a-44a). It is thus inaccurate and a factual misrepresentation to state that "none of the other jurors experienced any period of doubt before the matter was resolved." (Brief in Opposition, at 11) The trial court's refusal to examine other jurors denied Petitioners an opportunity to inquire into the apprehension and fears experienced by the other jurors.

The Government apparently concedes that the *Remmer* v. *United States*, 347 U.S. 227 (1954) presumption of prejudice survives the holding in *Smith* v. *Phillips*, 455 U.S. 209 (1982) (Brief in Opposition, at 12) but goes onto assert that the presumption is inapplicable to the present case for three reasons: (1) the present case "involves no third party contact at all." (Brief in Opposition, at 12); (2) "the only 'outside influence' on Juror Deaton was created by the juror himself when he misinterpreted the photography incident" (Brief in Opposition, at 12); and (3) "the photography incident did not involve a matter pending before the jury." (Brief in Opposition, at 12)

The Government's presentation of the foregoing three points simply denies any logical basis. (1) Although there was no oral or written communication between the photographer and the jurors, third party contact plainly is not limited to oral or written communications. In *Remmer* v. *United States*, 347 U.S. 227 (1954) this Court applied the presumption of prejudice to "any private communication,

contact, or tampering, directly or *indirectly*, with a juror." (emphasis added). The pointing of a camera equipped with a 12''-15'' telephoto lens from within a parked automobile at the jurors as they exited the courthouse certainly constitutes contact (direct or indirect) with jurors. Under the Government's reasoning, the pointing of a rifle at jurors would not involve third party contact. (2) The jurors' "misinterpretation" of the photographing incident cannot and does not negate its effect. As this Court noted in *United States* v. *Wood*, 299 U.S. 123, 149 (1936): "Impartiality is not a technical conception. It is a state of mind." Whether the jurors correctly or incorrectly perceived the photographing incident as a threat to their safety, their impartiality was affected. (3) The government's contention that the photographing incident "did not involve a matter pending before the jury" is erroneous since the record clearly indicates Petitioner Coddington was photographed. The photographing incident should not be perceived as communicating a substantive fact, but rather was perceived as a threat to the health, safety and welfare of the jurors should they return an undesired verdict. The perceived apprehension herein obviously involved a matter pending before the jury, the ultimate subject matter of the verdict to be returned.

The due process concept of notice requires that counsel be informed of the relevant factual situations and legal issues set forth, be allowed to develop additional facts, and have an opportunity to prepare legal argument for the court's consideration. The trial court's precipitous handling of the post trial hearing forced Petitioners' counsel to react spontaneously to previously undisclosed facts and thus denied Petitioners any opportunity to be heard in a meaningful fashion.

The Government's claim that no counsel at the hearing pressed the need to examine the 13 jurors is clearly a misstatement of the record. Petitioner Coddington's counsel did press such a need (83-1138 Pet. App. 50a).

The importance and relevancy of the questions presented by Petitioners Peed and Coddington go to the very basis and sanctity of our jury system and cannot be ignored or allowed to be further misconstrued by the Government.

The Government's inability to comprehend and address the questions presented by Petitioners brillantly illuminates the urgent need for guidance and affirmative action which only can be given by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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